91-625

No.

In the Supreme Court of the United States

OCTOBER TERM, 1991

E-V Company, a Partnership Composed of
Emil F. Kehr and Vincent E. Malone, and
Keller Office Equipment Company,
Petitioners,

v.

Urban Redevelopment Authority of Pittsburgh,
Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Pennsylvania

Petition For A Writ Of Certiorari

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THE QUESTION PRESENTED FOR REVIEW

Is a redevelopment taking of property void for lack of a due process hearing at a meaningful time and in a meaningful manner on the question of the validity of the prerequisite determination of blight when the condemnation occurred in 1981, the certifications of blight were 17 and 10 years earlier (without notice and an opportunity to be heard), no records of significance and no witnesses with a recollection of the earlier conditions were available, where massive changes took place in the area and where the condemnor had abandoned the project for six years?

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CONSTITUTIONAL AND STATUTORY PROVISIONS:

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

The Opinion of the trial court of February 21, 1986 is not officially reported. It is printed beginning at page A-56 of the Appendix to this petition.

The Opinion of the Commonwealth Court of Pennsylvania of July 8, 1988, appears in 117 Pa. Cmwlth. Ct. 475 and 544 A.2d 87, and is printed beginning at page A-44 of the Appendix to this petition.

The Opinions issued by the Supreme Court of Pennsylvania on July 12, 1991 have not yet been published. They will appear at Pa. and A.2d and are printed beginning at page A-1 of the Appendix to this petition.

STATEMENT OF GROUNDS FOR JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on July 12, 1991.

Jurisdiction is conferred upon the United States Supreme Court to review the judgment of the Supreme Court of Pennsylvania in question by writ of certiorari by the Act of June 25, 1948, c. 646, 62 Stat. 929, as amended, 28 U.S.C. 1257(a).

CITATIONS TO CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution amendment XIV, §1.

Sections 402(a) and 406 of the Pennsylvania Eminent Domain Code, Act of June 22, 1964, P.L. 84, 26 P.S. 1-402(a) and 1-406.

Parts of Sections 2, 3, 9 and 10 of the Pennnsylvania Urban Redevelopment Law, Act of May 24, 1945, P.L. 991, as amended, 36 P.S. 1702, 1703, 1709 and 1710.

See Appendix for texts.

STATEMENT OF THE CASE

(References in this petition to the Reproduced Record in the Supreme Court of Pennsylvania are made by R., followed by a page number.)

Preservation of Question Sought to be Reviewed

Under Pennsylvania redevelopment taking procedures, a condemnor, in this case the Urban Redevelopment Authority of Pittsburgh, effects a taking of property by filing a declaration of taking with the prothonotary of the Court of Common Pleas of the county in which the property to be appropriated is located. Title passes to the condemnor when a declaration of taking is filed.

Service is required to be made upon the property owner and any tenants within 30 days of the filing of the declaration of taking. An owner or tenant thereafter has 30 days in which to file preliminary objections challenging the power or right of the condemnor to take the property or challenging the procedures and form followed and the security filed with the declaration of taking. If preliminary objections which have the effect of finally terminating the condemnation are sustained, title is to be revested in the condemnees. Sections 402(a) and 406, Eminent Domain Code of Pennsylvania, Act of June 22, 1964, P.L. 84, as amended, 26 P.S. 1-402(a) and 1-406. See Constitutional and Statutory Provisions, A-95.

Upon being served with copies of the declaration of taking filed by Urban Redevelopment Authority of Pittsburgh in this case, petitioners-condemnees filed preliminary objections raising, inter alia, the defense that the taking was constitutionally void because they had not been afforded a meaningful hearing at a meaningful time to contest the determinations of blight by the Planning Commission of the City of Pittsburgh, a finding required to be made to authorize the exercise by the Redevelopment Authority of its power of eminent domain.

The preliminary objections of E-V Company are set forth in the Appendix beginning at page A-74. Preliminary Objections Nos. 11, 12, 14, 15, 17, 21-27 and 35 raise the issue requested to be reviewed by your Honorable Court.

The preliminary objections of Keller Office Equipment Company are printed beginning at page A-86 of the Appendix to this petition. The particular preliminary objection of Keller Office Equipment Company raising the issue sought to be reviewed by your Honorable Court is No. 4.

Petitioners presented to the trial court requests for findings of fact and requests for conclusions of law which included requests for a determination that the petitioners were denied a meaningful hearing at a meaningful time. Their requests appear at R. 62a through 141a. See particularly, as to preservation of the question for review, requested conclusions of law Nos. 3-9, 13, 15, 17-20, 29 and 37-39. The requests of petitioners to the trial court for conclusions of law are printed in the Appendix beginning at page A-89.

Part I of petitioners' brief and argument to the Commonwealth Court of Pennsylvania complained of the denial of the right to a meaningful hearing at a meaningful time. The Opinion of the Commonwealth Court of Pennsylvania evidences the consideration and denial of petitioners' arguments. Appendix beginning at page A-44.

The brief and argument of petitioners in the Supreme Court of Pennsylvania in Part I set forth their grievance that they had been denied due process of law and both the majority and the two dissenting opinions in the Supreme Court of Pennsylvania evidence the consideration by that court of the points raised by the petitioners. See Majority Opinion of the Supreme Court of Pennsylvania beginning at Appendix page A-1 and the two dissenting opinions of the Supreme Court of Pennsylvania beginning at pages A-15 and A-40.

The Procedural History

Urban Redevelopment Authority of Pittsburgh filed a declaration of taking (R. 4a) on October 9, 1981 in the Court of

Common Pleas of Allegheny County, Pennsylvania, appropriating the property of the petitioners which, at that time, consisted of an eight story building located on Isabella Street on the North Side of the City of Pittsburgh used for the retail sale of office supplies, office furniture and furnishings and the operation of a print shop and for a record storage business.

Vincent Malone and Emil Kehr, the principals of the petitioners, had purchased the Keller Office Equipment business located on Isabella Street in September of 1973 (R. 699a-701a, 715a) and then later purchased the land and the buildings in which the business was operated in June of 1977 (R. 700a).

As previously noted, under Pennsylvania law, a redevelopment authority can only initiate a project and thereafter use its power of eminent domain to acquire property for public use after a local planning commission has determined that the area in which the project is proposed is a blighted area within the meaning of the Urban Redevelopment Law. The resolution of the planning commission determining the existence of blight is certified to the redevelopment authority and to other public officials.

In this case, there were two certification of blight determinations by the Planning Commission of the City of Pittsburgh of the area which included the property later to be acquired by the petitioners. One was by a resolution adopted on December 18, 1964, certifying 202 acres as blighted (R. 154a, 158a, 356a, 1735a); the second was by a resolution which re-certified part of the 1964 area, including what was to become petitioners' property, and which added an additional area of 27 acres. That second resolution determining the existence of blight was adopted on October 7, 1971. R. 160a-162a, 1737a.

The declaration of taking filed by the Redevelopment Authority against E-V Company, the building owner, was filed on October 9, 1981 and thereafter was served upon the owners. A "re-instated" declaration of taking was thereafter served on Keller Office Equipment Company, the tenant of E-V Company. Each of the petitioners, E-V Company and Keller Office Equipment Company, timely filed preliminary objections

which are printed beginning at pages A-74 and A-86 in the Appendix.

Discovery processes were utilized and when the preliminary objections of the petitioners came on for trial, the case was ordered to be tried by depositions. Nineteen depositions were taken from September 24, 1982 to February 28, 1983. Numerous documents were offered by both sides, some of which were admitted into evidence without objection and some of which were admitted, refused or limited after consultation upon a recess of the deposition with a member of the trial court. Some of them were never ruled upon by any member of the trial court.

Requests for Findings of Fact and Conclusions of Law were submitted by each party to Judge Maurice Louik of the Court of Common Pleas of Allegheny County to whom the case was submitted for decision after the completion of the taking of depositions. Judge Louik filed an Adjudication and Order on February 26, 1986. Appendix page A-56. The Order of Judge Louik denied the preliminary objections of the petitioners.

The petitioners filed a Notice of Appeal to the Commonwealth Court of Pennsylvania at No. 821 C.D. 1986 which considered briefs, heard oral argument and filed an Opinion and Order on July 8, 1988 affirming the ruling of the trial court. Appendix page A-44.

Petitioners then asked the Supreme Court of Pennsylvania at No. 433 W.D. Allocatur Docket, 1988 for the allowance of an appeal which was granted on May 9, 1989 limited to the issues of whether the petitioners have been unconstitutionally denied a meaningful hearing at a meaningful time to challenge the certification of blight and whether the condemnation was invalid for failure to comply with the requirements of Pennsylvania's Local Agency Law (551 Pa. 539, 558 A.2d 529). After considering briefs and oral argument, the Supreme Court, on July 12, 1991 at No. 45 W.D. Appeal Docket 1989, affirmed by a 4-3 vote the decision of the Commonwealth Court of Pennsylvania. The majority opinion was written by Justice Zappala (Appendix beginning at page A-1); a dissenting opinion was

written by Justice Larsen (Appendix beginning at page A-15) and another dissenting opinion was written by Justice Flaherty (beginning at Appendix page A-40). Justice Papadakos joined in both the dissenting opinions of Justice Larsen and of Justice Flaherty.

This petition follows.

Facts

No notice was required by statute and no notice was given to anyone by the Planning Commission of the City of Pittsburgh that it would consider at its meeting of December 18, 1964, the question of certifying as a blighted area the area in which the property later to be occupied and purchased by the petitioners was located. R. 146a, 147a, 166a, 167a, 684a, 685a.

No hearing was conducted in 1964 on the question of whether or not the area should be determined to be a blighted area. R. 166a, 167a; Admission of Authority in paragraph 23 of its Answer to Preliminary Objections to Declaration of Taking, R. 1683a. Nor was there notice or a hearing with respect to the consideration in 1971 of recertifying part of the area previously certified as blighted and of certifying as blighted an additional area. R. 166a, 167a, 307a, 308a; Admission of Authority, R. 1683a.

No property owners or tenants or owners or operators of businesses were notified of either meeting or were present at either meeting although the City Planning Department had the means to know from official records who such people were and their addresses. R. 905a, 914a, 915a, 1373a-1375a.

At each of the 1964 and 1971 meetings, a finding of blight was made by the Planning Commission of the City of Pittsburgh and the area including the property later to be acquired by the petitioners, was certified to the Redevelopment Authority as a blighted area for redevelopment. R. 154a, 158a, 356a, 1735a; 160a-162a, 1737a.

When Malone and Kehr bought the Keller Office Equipment Company business in 1973, neither of them knew that the

area in which the business was located had been certified as a blighted area. Nor did the seller of the business to them know of any certification of blight. R. 711a, 712a. He had operated his business there for eight years. R. 699a-701a and 715a.

Nor later, when Malone and Kehr, under the name E-V Company, bought the land and buildings of Keller Office Equipment Company, were the purchasers aware that the area had been previously certified as a blighted area. A title search of the property made in the course of purchasing it by E-V Company had failed to disclose any indication of a certification of blight. R. 700a, 704a, 705a.

After acquiring the property, E-V Company prepared and submitted to the City Planning Commission and other officials a subdivision plan for the property which had included several buildings in addition to the eight story building which is the subject of this case. The City Planning Commission approved the E-V Company subdivision plan, as did other officials, and the subdivision plan was recorded.

Thereafter, in March of 1980 and in February of 1981, E-V Company sold two of the buildings comprising its holdings. Each of the purchasers had a title examination done. Neither title examination turned up the certification of blight proceedings. R. 703a, 704a, 715a-717a. Nor when E-V Company sold the properties was there ever an indication from either the City or the Authority that E-V Company could not sell its properties. R. 717a.

In March or April of 1980, E-V Company substantially renovated its eight story building. A building permit for electrical work was obtained from the City of Pittsburgh as part of the renovation work with no difficulty encountered in obtaining the permit. R. 727a, 728a.

In 1972, a neighboring property owner on Isabella Street had bought additional land and in November of 1975, to construct a building on it, he sought approval from the City of Pittsburgh Zoning Board of Adjustment for a variance to utilize the entire lot for the building. The variance was granted without

difficulty and without any reference at all to the area having been certified as a blighted area. For that same construction, building, electrical and occupancy permits were issued by the City of Pittsburgh. $100,000.00 was expended by the neighbor for the renovations. R. 908a-913a, 915a-916a and 948a.

By trial deposition, the petitioners proved through a title examiner of an established title insurance company in Pittsburgh that he had searched the title records of the petitioners property and of an adjoining property back to the year 1950 and found no reference to the area in which the property was located as having been certified as a blighted area. R. 189a-191a and 197a.

No action had been taken by Urban Redevelopment Authority of Pittsburgh following the 1964 certification of blight until the years 1970 and 1971 at which time a Basic Conditions Report was prepared by the Planning Department of the city as a prelude to recertifying part of the original area as blighted and certifying an additional area as blighted. R. 1304a, 1302a, 1312a.

The planners, including Mr. Waddell who prepared the September 1971 Basic Conditions Report, considered that there was a need for an update of the study made prior to the 1964 certification because of the lapse of seven years since that study. The information in it was considered to be "outdated." R. 1365a, 1366a. Waddell considered the outdated 1964 data inadequate and felt it was significant to get more recent information on the question of recertifying the area previously certified in 1964. R. 1365a-1368a.

After the October, 1971 certification and the approval of a Redevelopment Proposal and Plan, some properties in the area were acquired during the early 1970s by the Authority until on June 1, 1973 the Authority curtailed the project, filed declarations of relinquishment as to 11 acquired properties revesting title in the persons whose properties had been condemned, revoked offers to purchase and requested transfer of the federal funds for the project to another project in another part of the

City of Pittsburgh. R. 1741a, 1742a, 346a, 1740a, 541a-545a, 1743a-1745a.

In 1974 or 1975 the funding for the project was shifted to other projects located in other parts of the City of Pittsburgh. R. 539a.

During the 17 years from 1964 through 1981, numerous other activities were taking place in what had been designated by the Redevelopment Authority as the North Shore Project area. There were 81 private conveyances of 70 properties (some more times than one) out of 200 or less properties in the area. These were conveyances from private persons or entities to other private persons or entities. The number does not include any conveyances to governmental agencies. R. 1037a, 1038a, 1746a, 1748a-1752a.

At least 26 new businesses had moved into the area since the certifications, the overwhelming majority of them within the last six or seven years prior to the trial of the case and after 1973. They were all located within a block or two of the subject property. R. 991a, 993a, 918a, 919a, 1747a.

No store room or office space in the vicinity remained empty during the period for as much as three months. R. 848a.

Twenty-three building permits were issued by the city in the project area during the period from 1978 (when records were available without having to go back into the city's archives) until the date of condemnation. R. 1049a, 1050a.

An unknown but large number of properties were acquired and buildings demolished by the Department of Transportation of the Commonwealth of Pennsylvania in this particular area in the years 1972 and 1973, and later, for the construction of two limited access highways and their connecting roads. R. 428a, 429a. There were a lot of buildings gone. R. 1348a-1352a.

There were other community developments and activities during the 1960s and 1970s which affected the area in which petitioners' property is located. Those activities included the development of Allegheny Center in the early 1960s, the construction of the Allegheny County Community College, the

opening nearby of Three Rivers Stadium in July, 1970, and the expansion of Allegheny General Hospital. R. 1050a, 1051a.

Renovations of buildings had been extensive during the period between the blight certifications and the condemnation of 1981. There had been renovations in at least 9 nearby buildings. R. 761a, 762a, 764a, 766a, 767a, 177a-179a.

None of these activities and none of the sales were followed or monitored by the Redevelopment Authority or the City Planning Department or the City Planning Commission. Nor was there any mechanism by which the Planning Commission or the Planning Department of the city, which served as the staff of the Planning Commission, obtained any information as to private transfers. The Authority did not attempt to stop or prohibit private property transfers. R. 394a, 397a, 462a, 456a.

Personnel of the Redevelopment Authority did not consider it necessary for the Authority to follow or be involved in activities and transactions taking place in the project area, even over a period of time. The Chairman of Urban Redevelopment Authority of Pittsburgh and the planner in charge of the project believed that any property within the area certified as blighted could be acquired by the Authority at any time without there being any specific time limit, notwithstanding the private transfers of title and other activities which had taken place within the area since the certification or recertification of blight. R. 483a, 484a, 463a, 469a, 1141a, 1142a, 1157a-1163a, 1177a, 1178a.

In 1979, the Redevelopment Authority contacted Mellon-Stuart Company, a general contracting firm in Pittsburgh, and initiated discussions about Mellon-Stuart becoming a developer of properties on Isabella Street, including the land area where the petitioners' property was located. Mellon Stuart had a very real intent in relocating a headquarters building to the North Side of Pittsburgh. R. 1135a, 1136a.

Mellon-Stuart Company and the Urban Redevelopment Authority entered into an agreement (R. 1170a, 1171a) and the City Planning Commission and the Redevelopment Authority

and the city thereafter adopted resolutions, without any notice to property owners or tenants or business owners or operators, including petitioners, modifying the 1971 Redevelopment Proposal and Plan to authorize the taking of properties on Isabella Street, including the property of the petitioners. R. 553a-556a, 338a, 339a, 587a.

No "updating" of information relating to conditions within the certified area which might pertain to the existence or not of blight in 1981 was initiated or undertaken by the Planning Department of the City or by the City Planning Commission or by the Redevelopment Authority.

In one of the first trial depositions in this case, Malcolm Strachan, a city planner with a graduate degree in that field and with extensive experience in the planning aspects of redevelopment work, described the process by which a determination is made by a planning department and a planning commission of whether or not an area under consideration is "blighted" within the meaning of the Urban Redevelopment Law of Pennsylvania.

After describing the process, Mr. Strachan—who had inspected the site—testified that as of 1982 or 1981, the year of condemnation, he could not reconstruct, as a planner, the project area as it had existed in 1964 and 1971 and could not in 1981 make a study such as would be required to determine whether the area was blighted in 1964 or 1971 because of the great number of changes which had taken place in the area. R. 238a, 239a. In his words, the "record as it was in '64 and '71 is lost." R. 238a, 239a.

A real estate appraiser called by the condemnees-petitioners by way of trial deposition, who had substantial experience in redevelopment matters over the years both for and against redevelopment authorities, testified that it would have been impossible in 1981 to ascertain what properties existed in the area in 1964 or 1971 or what the uses of them were or what percentage of the properties were residential or vacant or commercial in those years. To make a definitive study would be almost impossible. R. 1088a, 1089a.

By other trial depositions, petitioners called and cross-examined witnesses in the trial court to demonstrate that the petitioners were being denied an effective opportunity to defend against the 1981 condemnation by showing that there were no documents and there were no witnesses with firsthand knowledge and adequate recollection available 17 and 10 years after the certifications of blight to be examined or cross-examined by the petitioners as to the existence or not of alleged conditions of blight in 1964 and in 1971.

In response to a subpoena duces tecum, Robert Lurcott, the then Director of the City Planning Department, testified that he and his staff had examined all the records of the Commission and of the Planning Department with regard to the 1964 and the 1971 certification of blight proceedings and had found no notes, memoranda, drafts, recordings or records other than the minutes of the two Planning Commission meetings themselves. Nor any records showing the amount of time that was spent on work or study of the area or, except for Waddell, what persons were assigned to the study. Director Lurcott, who had not been with the City Planning Department in 1964 or in 1971, had no personal knowledge respecting those certification proceedings. R. 163a-165a, 171a, 154a, 156a-158a, 161a-163a, 170a, 172a, 179a, 180a.

The secretary of the Planning Commission in 1964, Linn Washington, was called as a witness by petitioners to demonstrate lack of knowledge considered essential to petitioners for them to successfully attack the underlying blight certifications. Mr. Washington had served on the Commission for six years and had been secretary of it for three years. He testified by deposition that he had a recollection that there had been a blight certification procedure relating to the North Side during the early 1960s, but he did not have any recollection of the location of it, the acres involved, the street boundaries, the number of structures involved, the breakdown of the properties as between residential, commercial or what, or how much of the land involved was vacant. His reason for not knowing was, "I just don't recall." R. 677a-678a, 680a, 681a.

Similarly, by trial deposition, petitioners called Paul G. Sullivan who was a member of the Planning Commission in the early 1970s and had been secretary of it in 1971. Mr. Sullivan had a hazy recollection that there had been a blight certification proceeding in 1971 but he had no recollection of the details of the matter at all, including the number of blocks, the number of structures, how many properties were vacant, commercial or residential or industrial, except that there were some of each. He did not know the proportions of each and he could not recall whether any materials were presented to the Commission or what Waddell had said, although the minutes of the meeting noted that Waddell had made a presentation.

At the trial by deposition, the Authority produced William Waddell who had joined the Planning Department of the city in 1970 and who had helped prepare the Basic Conditions Report, September 1971 which was used as the basic document for the 1971 recertification and certification of blight. R. 1302a, 1304a.

It was Mr. Waddell who had determined that seven years had elapsed since the prior study of the area and that that data needed to be updated by an additional study prior to a recertification and new certification. R. 1365a-1368a.

Mr. Waddell, however, did not recall what other subjects were discussed at the October 4, 1971 meeting, was vague as to the number of properties located in the project area—he thought there might be 200 or less—was unable to state the mix of the buildings as to their uses or the number of residences, was unable to state how many of the residential properties were two-story family dwellings, and when pressed about specifics, indicated that "That's a long time ago." R. 1361a, 1362a, 1369a, 1370a, 1376a, 1377a.

Waddell knew a number of properties were demolished by the Department of Transportation but as to the number he said, "I couldn't guess. It's just too far back to give you an exact number." R. 1352a.

Another witness called by the Authority was Jan Krygowski who had been Planning Director for the Authority. Mr.

Krygowski also could not remember any details about the certification process or the condition of the area in 1971. He testified, "It was a long time ago; I don't remember." R. 1395a, 1462a, 1464a, 1465a.

At trial, the Authority attempted to introduce into evidence numerous exhibits relating to the 1971 certification of blight. Upon objection by petitioners on the ground that the persons who had prepared the exhibits and the persons who had made obvious alterations to them were not available for cross-examination, the trial court ruled that the fact of the existence of the documents could be introduced into evidence to show good faith on the part of the Authority but, with one exception, Exhibit Z, the Basic Conditions Report, September 1971, prepared in part by Waddell, the contents of the exhibits were not to go into evidence to prove the truth of anything in them. R. 1272a, 1274a.

One of those exhibits, Exhibit O, contained 322 sheets, each entitled Urban Redevelopment Authority Detailed Land Use and Exterior Survey Sheet. Each sheet contained a photograph of a building or property and a description and grading of it. There were numerous alterations on many of the sheets written in a different handwriting and by a different type of writing instrument. Neither the persons who had originally prepared the sheets in the exhibit nor any persons who had reviewed them or made alterations of them were called as witnesses on behalf of the Authority. R. 1236a. It was agreed by counsel for the condemnor that there was no evidence that the 322 sheets had ever been seen by the Planning Commission. R. 1256a, 1257a, 1259a.

A witness for the Redevelopment Authority was Kenneth Britz, a planner, who had been retained by it in June of 1979 to be in charge of the North Shore Project. R. 353a, 355a, 394a. Mr. Britz had no personal knowledge of any of the activities in 1964 or 1971. Britz had reviewed all of the files and documents of the Redevelopment Authority relating to the two certification of blight proceedings. He was not able to testify as to anything on the 322 sheets making up the Authority's Exhibit O or to any

other matter of his own knowledge regarding the blight certifications. He had not prepared any part of the papers relating to those proceedings. R. 1236a, 1260a.

Vincent Malone, one of the petitioners, who knew the area since 1951, testified that in 1964 and in 1971 the area in which the property was involved was a very viable neighborhood with a lot of business and activity and that it was not a blighted area in 1964 or 1971. He specifically rebutted—point by point—the existence of any elements of blight in the area in those years. R. 747a-753a, 782a, 784a.

ARGUMENT

I. A Redevelopment Taking Is Void For Lack Of Due Process Where The First Opportunity To Challenge The Correctness Of A Prerequisite Determination Of Blight Is Not Afforded Until 17 Or 10 Years After The Determination Which Was Made Without Any Notice To The Then Property Owner And Where No Records Or Record Keepers Are Available At The Time Of Trial, Where Massive Changes In Conditions In The Area Have Taken Place Over The Years And Where The Condemnor Itself Abandoned The Project For A Long Period Of Time.

The public use which constitutionally justifies a taking of property for redevelopment purposes is the clearance of conditions of blight.

A condemnee who wishes to challenge a taking of his property for redevelopment purposes necessarily has an absolute right to question the determination that the area in which his property is located is, in fact, a blighted area. Under Pennsylvania redevelopment taking procedures, such a condemnee files preliminary objections to the declaration of taking filed by the redevelopment authority condemnor raising the appropriate issues. *Faranda Appeal*, 420 Pa. 295, 216 A.2d 769.

Immediately post-World War II, when redevelopment laws were enacted across the nation and a substantial effort was made by cities to clear slums and blight, the normal course of a

redevelopment project was for a planning study to be made, to be followed promptly by a finding of blight, to be followed promptly by the preparation of a redevelopment proposal, to be followed promptly by acquisition, demolition and transfer of title to the cleared property to redevelopers with restrictive covenants.

Under such a scenario, a protesting property owner wishing to challenge a redevelopment taking of his property had at least the evidence appropriate to his attack, the witnesses with events fresh in their minds and the documents which would prove (or disprove) his case. He could defend against the claimed public use of the elimination of existing blight at a meaningful time and in a meaningful manner. Helpful to him or not, the evidence for the contest was available. It was fresh.

That such is not this case is as obvious as a full moon in a cloudless night sky.

The "meaningful time to be heard" constitutional mandate is so that a litigant may be able to examine and cross-examine knowledgeable fact witnesses; so that he may examine, inquire into and probe documents; so that he may have the relevant facts available to rebut or vanquish his opponent's case in chief and to develop and present his own case in chief by fresh evidence.

When the documentary evidence is not available, when knowledgeable participants are not about, and when those who are able to be located no longer remember because 17 or 10 years have passed, and when massive changes in the area have taken place, including the private transfer of 35% of the properties in the area (70 out of 200 or less), one challenging a certification of blight is absolutely frustrated—constitutionally impotent—in developing proof, and he has, therefore, been denied due process of law and no condemnation predicated upon such an antique determination can be sustained.

Particularly is this so where the redevelopment project, as in this instance, was effectively terminated by Urban Redevelopment Authority of Pittsburgh for a six year period by the

active steps on its part of filing declarations of relinquishment for properties which it had already acquired, by the revocation of offers to purchase which it had extended and by the transfer of the project funding to other projects. The responsibility for the necessary voiding of this condemnation is that of the Urban Redevelopment Authority of Pittsburgh.

Vincent Malone and Emil Kehr purchased a business on the North Side of Pittsburgh, and then, trading as E-V Company, they purchased the building and land where the business was located altogether unaware, from any source, that there had been a certification of the area in which the business and property were located in 1964 as a blighted area with a recertification of blight by the Planning Commission of the City of Pittsburgh in 1971, two years before the business was purchased and six years before the land and buildings were purchased.

The certifications of blight were made by the Planning Commission of the City of Pittsburgh pursuant to the Urban Redevelopment Law, Act of May 24, 1945, P.L. 991, 35 P.S. 1701, et seq. Section 10 of that statute, 35 P.S. 1710, in subsection (a), authorizes an Authority to prepare a redevelopment proposal for all or any part of an area certified by the appropriate planning commission to be a redevelopment area.

Section 1703(n) of the Urban Redevelopment Law, 35 P.S. 1703(n), defines a "Redevelopment Area" as any area, whether improved or unimproved, which a planning commission may find to be blighted because of the existence of the conditions enumerated in Section 2 of the Act.

This is the implied authority for a governmental planning commission to study an area and certify it as a blighted area. Such a certification enables a redevelopment authority to exercise the power given to it by Section 1709(i) of the Act, 35 P.S. 1709(i), to acquire by eminent domain any real property, including improvements and fixtures, for the public purposes set forth in the Urban Redevelopment Law, in the manner provided in the law, except for real property located outside a redevelopment area. Absent a valid certification of blight by a

planning commission, a Pennsylvania redevelopment authority has no power of condemnation.

There is no provision in the Urban Redevelopment Law for a "due process hearing," following notice, with regard to a certification of blight determination by a planning commission.

But, of course, the constitutional guarantee of due process of law is not dependent upon there being a statutory basis. Our under-appreciated common law system of judging enables judges and justices to harken to, and declare, what fairness is and what fairness requires.

In this case there is no difficulty about what the law should be and is. The law applicable to this case is rudimentary; it is elemental.

When your Honorable Court in *Armstrong v. Manzo*, 380 U.S. 545, reaffirmed in that adoption case the fundamental requirement of due process that there be notice and an opportunity to be heard, it added, in the words of Justice Stewart, 380 U.S. at 552, the specific requirement that the opportunity to be heard " ..... is an opportunity which must be granted at a meaningful time and in a meaningful manner." On the solid rock of *Armstrong v. Manzo*, the state supreme court in this case must be reversed, the preliminary objections to the declaration of taking sustained, the 1964 and 1971 certifications of blight be declared nullities and the condemnation voided.

Both of the core rationales of *Armstrong v. Manzo* apply to this case.

One of them, of course, is the reasoning that the opportunity to be heard must be granted at a meaningful time and in a meaningful manner as a matter of simple fairness in litigation.

The other is the concept that a shift of the burden of proof imposed by a delayed hearing deprives a litigant of due process. Again in the words of Justice Stewart, 380 U.S. at 552, "Only that [voiding the proceedings below] would have wiped the slate clean. Only that would have restored the petitioner to the position he would have occupied had due process of law been

accorded to him in the first place." These are fundamental tenets of our concept of due process of law.

The first opportunity of the condemnees in this case to a hearing on their challenge to the validity and propriety of the 17 year old and 10 year old certifications of blight (afforded to them by their having filed preliminary objections under Section 406 of the Eminent Domain Code, 26 P.S. 1-406) was so long after the events as to deprive them of an opportunity to be heard at a meaningful time and in a meaningful manner.

But the filing of preliminary objections also carried with it, as was the case in *Armstrong v. Manzo, supra,* a shifting of the burden of proof to the petitioners to overcome the presumed regularity, good faith and appropriate discretion of the Planning Commission certifications. In fact, the burden cast upon the condemnees in their preliminary objections challenge is characterized in Pennsylvania as a "heavy one." *Simco Stores v. Redevelopment Authority of the City of Philadelphia,* 455 Pa. 438, 317 A.2d 610; *Pittsburgh School District Condemnation Case,* 430 Pa. 566, 244 A.2d 42.

There would obviously be no burden of proof on property owners—at least none is implied by the language of the Urban Redevelopment Law—to show that an area under consideration for certification as a blighted area was, in fact, or in law, or both, not blighted. That is not a rule to show cause proceeding directed against property owners. Either there is no burden of proof in certification of blight proceedings or there is a burden on the planners proposing certification to the city planning commission to persuade it that there is blight as a matter of fact as the criteria of blight are defined in Section 1702(a), 35 P.S. 1702(a), of the Urban Redevelopment Law.

In either event, the burden at the time when property owners or tenants or business owners and operators ought to be able to object and be heard—at the time of certification—is not on them.

But under Pennsylvania law, as noted, once the certification has taken place and redevelopment proposals and plans

have been submitted and approved, and a declaration of taking has been filed by a redevelopment authority, there is then a heavy burden upon a property owner to overcome the condemnation, including the issues of the discretion and validity of the actions of the planning commission in its certifying process. There is a presumption running against the objectors. Under *Armstrong v. Manzo*, 380 U.S. 545, this is not allowable. The slate has not been wiped clean.

As to a "meaningful time and in a meaningful manner" generally, as opposed to the related but integral question of the shifting of the burden of proof, the ultimate facts in this case unquestionably support the claim of the condemnees that affording an opportunity for the first time 17 years after the 1964 certification of blight or 10 years after the 1971 certification of blight for them to contest the validity and the propriety of the certifications is totally, absolutely and unquestionably unconstitutional. This is not a prompt hearing. This is not a hearing at a meaningful time.

First, as to notice, it is undisputed and clear from the record that no notice was given to any property owner or tenant or business owner or operator of the Planning Commission meetings at which the certification of blight items were on the agenda. A thorough search of the records of the Planning Commission and of the Department of Planning of the City of Pittsburgh revealed no evidence, even by advertising, of notice. Nor was it considered necessary. R. 166a, 167a, 307a, 308a, 684a, 685a, 905a, 914a, 915a.

Of course, notice could easily have been given in 1964 and in 1971. The Planning Commission and the Department of City Planning had available to them official records of names and addresses R. 905a, 914a, 915a, 1373a-1375a.

Nor is there any question that there was no hearing at either certification meeting which would comply with due process of law requirements. This was admitted by the Authority in its pleadings (R. 26a, 18a, 1683a), is not disputed and is clear from the evidence produced in the case. In the words of Waddell (the Community Planner) such meetings were, " . . . not a

cross-examination time." R. 1375a. The Commission secretaries and the minutes confirm there were no hearings.

There are a number of general propositions establishing why, apart from the shifting of the burden of proof and from its unfairness to a litigant, a certification of blight challenge 17 years or 10 years afterwards is not effective, is not meaningful, is not efficacious.

The certifications can be considered as stale in the context of appropriate government action and good planning. Waddell, when he began to prepare the Basic Conditions Report, September 1971 (Exhibit Z) in 1970, recognized that the data available to him from the 1964 certification process was "outdated" so that a new study was required. R. 1365a-1368a. If seven years was stale, a fortiorari, 10 years is stale.

Estoppel is another basis. Municipalities in Pennsylvania are subject to estoppel. *Breinig v. County of Allegheny*, 332 Pa. 474, 2 A.2d 842. The curtailment by the Authority of this project (Condemnees' Exhibits 38, 39 and 40, minutes of meetings); the relinquishment of title to properties acquired for the project by the filing of declarations of relinquishment with title revested in the condemnees; the revocation of offers to purchase; and the transfer of funds out of this project to other projects in the city amounted to an abandonment of the project in 1973 so that the Authority must be estopped—in justice—from utilizing stale certifications of blight as the justification for the 1981 condemnation.

Combined with the official actions of the Authority by board resolution curtailing the project, in effect terminating it, the undisputed facts of lack of attention, lack of monitoring and total absence of controls from the curtailment actions in 1973 until 1979, a period of approximately six years, argue that the Authority may not be permitted to unilaterally start up again without there being a new study, evaluation and review affording those affected an opportunity to be aware of what was happening and a forum in which to be heard and object.

When 81 conveyances of real estate from private persons to private persons involving 70 properties take place without the knowledge of the critical personnel of the Authority over a period of years; when 23 building permits are issued without the knowledge of the Authority; when extensive renovation of properties has been done and a subdivision plan approved and 26 new businesses have come into the area and demolition of structures have occurred for highway purposes—all unknown to the Authority and not monitored by it in any way—when four title examinations on Isabella Street done for real estate closings (and two for trial) failed to show any certification of blight proceedings, the project, however auspicious or inauspicious its beginning, was and should have been, abandoned. The governmental agencies involved had no right, under our due process of law requirements, to have started it up again without a proper factual foundation; a due process approach.

All the more so because the consultant-spokesman for the Authority testified that he knew of no document limiting the time within which a redevelopment authority could condemn, or of any limitation on the power to condemn property notwithstanding private conveyances following a certification of blight. R. 469a. Even the Chairman of the Authority testified that an authority could condemn property without time limits and notwithstanding transfers between private owners. Finally—and a course of action the condemnees say should have happened here—the Chairman admitted on cross-examination that any sensible person, after a substantial period of time and after substantial change from a certification of blight, would evaluate the circumstances and renew the certification of blight. R. 1158a, 1162a, 1163a.

To have persuaded the Planning Commission in 1964 or 1971 that the area on the North Side of the city proposed to be certified as blighted was, in fact, blighted, the Planning Department personnel at that time would have to have demonstrated to the satisfaction of the Planning Commission members that there were elements of blight in the area of the type specified in Section 1702(a), Urban Redevelopment Law, 35 P.S. 1702(a).

At the time of the certification of blight proceedings those issues of fact could have been efficaciously addressed in a contest by objecting property and business owners and operators. The evidence would have been fresh and available.

Seventeen and 10 years later no successful attack could be made for at least four specific, significant and controlling reasons:

A.

At the time of the hearing there were no record makers to be examined or cross-examined.

At the hearing, the Authority wished to get into evidence as its Exhibit O, inspection reports relating to each of the properties making up the project. There were 322 undated sheets of paper which made up Exhibit O, the sheets being entitled "Urban Redevelopment Authority of Pittsburgh Detailed Land Use and Exterior Survey Sheet." One or more photographs were attached to each sheet. R. 1236a. The witness through whom the Authority proffered the sheets was Kenneth Britz who was not the person who had prepared the forms or who had taken the pictures. R. 1259a. He was not with the Authority until 1979.

These inspection reports would be the key to the proof by the Authority—or by planners before the Planning Commission—that the project area was indeed a blighted area. Individually and collectively those reports would be the "record," the image, the photographic imprint of the land uses, the condition of the structures, the street pattern and the extent of land coverage.

There were numerous other documents proffered by the Authority during Britz' direct examination in its case in chief, documents relating to studies, reports and investigations. Except for Exhibit Z, none of these exhibits offered by the Authority was admitted into evidence as to the contents of the documents.

They were admitted on the ruling by Judge McGowan (R. 1272a-1274a) for the limited purpose only of showing that they

had been prepared and were in the files of the Authority. This was to support a claim by the Authority that it acted in good faith. But no part of the contents of any of the exhibits (except Exhibit Z), in accordance with the ruling of the court, was admissible to prove the truth of anything in them.

The Authority could not get into evidence the contents of the documents which it said demonstrated its good faith. It could not get them into evidence because it did not have the record makers available to authenticate the documents! Of course not, the documents were made years and years before the condemnation. And as to many of them, including the 322 sheets making up Exhibit O, it was unknown who prepared them, who altered them and when they were prepared and altered. They were undated and unsigned.

What good is it to a property owner where the persons who produced or changed or modified the documents are not available to be examined or cross-examined as to the method of acquiring the data; the thoroughness employed; the accuracy of the data; the quantum of the data as to its sufficiency individually or taken all together to support conclusions made; the competency of the investigators; the reliability of memory; the opportunity to observe; the presence of bias or interest; and the motivation and industry of the record makers?

If so much time has passed from the time of certification to the time of hearing that the record makers cannot be produced, then the objector does not have an opportunity to be heard in a meaningful manner at a meaningful time.

B.

Since at the hearing no record makers were available, then no records were available to be examined

From the standpoint of a fair hearing, a fair opportunity to be heard, in the absence of record makers who had prepared the documents (with one exception) proffered by the Authority, there were no records to be reviewed, questioned, inquired about or overcome at the hearing. If cross-examination is not

feasible, then data and opinions as to which cross-examination is sought, are not admissible.

Director Lurcott testified that he and his staff, after a search of the records of both the Planning Commission files and the Department of Planning files, had not found any rough notes, memoranda, drafts or recordings made at any meetings of the Planning Commission relating to the certification of blight meeting in 1964 or to that in 1971 or to any other action or discussion of those plans and proceedings in the Planning Commission. R. 163a-165a.

Nor were any records found which existed at the time of trial which would show the amount of time spent by each member of the Commission or by each employee of the Department of Planning on work or study involving the review of properties on Isabella Street or of the subject property in connection with the study for the certification of blight in 1964 or relating to the study for the certification of blight in 1971; or, except for Waddell, the persons involved. R. 171a. Surely, the time spent and the identification of the workers are appropriate subjects for cross-examination.

So now we have, 10 or 17 years after the event, a judicial inquiry into the appropriateness, wisdom and validity of governmental actions which are unable to be reviewed because neither the persons having firsthand knowledge and recollection, nor the documentation upon which the governmental action was presumably based, are available for examination. In the absence of such documentation, there is not a meaningful opportunity to be heard at a meaningful time.

C.
The witnesses associated or formerly associated with the Planning Commission or the Authority uniformly did not have sufficient recall of the certification proceedings to assist in the judicial search for the truth

The Secretary of the Planning Commission in the early 1960s, including at the time of the certification meeting of December 18, 1964, called as a witness for the condemnees at

trial, could only recall that some time during the early 1960s there was a certification question relating to part of the North Side as a blighted area before the Planning Commission; could not recall how many acres were involved or the boundaries by streets or the number of structures or the percentage of types of structures as between residential, commercial or what; or how much of the land involved was vacant. He had no recollection of the meeting other than the bare bones of the minutes and he did not recall whether any materials were presented to the Commission members. When asked how it was that he did not know the answers to the questions, that gentleman responded, "I just don't recall." R. 678a-681a, 685a-688a.

Likewise, the Secretary of the Planning Commission at the time of the October 4, 1971 certification meeting did not know how many blocks were involved in the area certified; nor how many structures were involved; nor how much land was vacant; nor how many structures were residential or industrial or commercial or the proportions of the various types. His recollection of the certification process was very hazy and he had no recollection of the details of the matter at all. That gentleman could not state when questioned at the hearing what the then Director of the Department of Planning had stated at the meeting, nor what Mr. Waddell had said, although the minutes reflected that both had made a presentation. The former Secretary also could not recall whether any materials were presented to the Commission members or whether the question of certification had been brought up at a prior meeting. R. 299a-319a.

Jan Krygowski was produced as a witness by the Authority which claims that he had firsthand knowledge at the time of the hearing about the certification procedures since he had been Planning Director for the Authority in the mid-1970s and had worked for the Authority and for the city and other agencies prior to that time. But Mr. Krygowski, while he had a recollection of reviewing the 1964 documents, had no recollection of the documents themselves. R. 1395a, 1462a. And as to the October 4, 1971 meeting, Mr. Krygowski had no recollection of being present at the meeting, although the minutes show that he was. He could only remember the names of two members of the

Planning Commission at that time, saying, "It was a long time ago; I don't remember." R. 1395a, 1462a, 1464a, 1465a, 1737a, 1738a.

Also, although Mr. Krygowski did remember there were probably around 200 structures, maybe less, of all types in the North Shore Project Area in October of 1971, he could not remember and testify as to the number of structures which were commercial or industrial or residential; nor did he know how many businesses had moved into the project area between 1965 and 1971. R. 1467a, 1470a. In challenging a certification of blight, the objectors ought to be able to inquire specifically as to the mix of property uses.

William Waddell was also a witness for the Authority at the hearing. He was advanced by it as a witness who could answer questions pertinent to the inquiry. He had become the Community Planner for the Planning Department in 1970.

At the hearing, Waddell could not remember how many residences were in the project area in September of 1971; nor did he have a breakdown as to how many structures were two family dwellings; nor did he know how many properties had been demolished by PennDOT for highway purposes, although he did testify that there were obviously a lot of buildings gone. Mr. Waddell could not remember other subjects discussed at the October 4, 1971 meeting and gave as the reason, "That's a long time ago," He could not approximate how many structures had been acquired by PennDOT, saying, "I couldn't guess. It's just too far back to give you an exact number." R. 1348a-1352a, 1361a, 1362a, 1376a, 1377a.

Mr. Britz, the spokesman/consultant for the Authority, of course, knew nothing about the 1964 or the 1971 certifications of blight proceedings having only come on the scene as Project Director in June of 1979.

These facts speak for themselves. None of these witnesses had any information that would be of assistance in late 1982 and early 1983 (the time of the depositions) to the condemnees

in challenging the validity and propriety of the certifications of blight.

D.

By the time of the taking of the depositions in late 1982 and early 1983, the evidence of the project area itself, the "record" was gone and there could not be any meaningful hearing regarding that which had been massively changed

Obviously, to determine whether the certified area was blighted in 1964 or 1971 one must know what the area looked like at that time.

By the time of the taking of the depositions from September of 1982 to February of 1983 following the October 9, 1981 condemnation, the evidence had been destroyed. There was no opportunity to reconstruct it, mentally or physically. What is the crux of this entire case—whether the area evidenced conditions of blight in 1964 and 1971 justifying a certification of blight—had been obliterated.

It has been obliterated, been massively changed, by 81 transfers of 70 properties between the years 1964 and the date of condemnation; by 26 new businesses coming into the area; by the demolition of an unknown but large number of properties by PennDOT for highway purposes; and by the effects of significant changes in the area described in detail in the testimony.

Malcolm Strachan, city planner. testified logically that when he made his inspection of the property of the condemnees and of the area generally in 1982, or even a year earlier at the time of condemnation, it would not have been possible to prepare from the data then available, a certification of blight study as the area existed in 1971 or in 1964. In Mr. Strachan's words the "record as it was in '64 and '71 is lost, as far as I'm concerned." R. 238a, 239a.

A real estate appraiser called by the condemnees having extensive experience in the redevelopment field and on the North Side of Pittsburgh, Patrick McGrath, testified that it was virtually impossible as of the time of his testimony to make a

determination of what the uses of properties were in 1964. He could not see how anybody could go back in time and determine what the uses of properties were unless all of the property owners were interviewed. R. 1088a, 1089a.

At least one subdivision plan (for the subject property) had been issued, building permits had been issued, remodeling and renovation had been done and the Authority had curtailed, abandoned, the project.

It was not possible at the time of the hearing to say what the area looked like in 1971 or 1964. The res was not the same.

Instead of moving expeditiously on its project in 1964 or in 1971 at a time when knowledgeable witnesses and pertinent documents were identifiable and usable, the Authority abandoned the project, paid no attention to the transfers of property between private persons or to the changes and developments taking place in the area and attempted to exercise no control over the area which had earlier been subjected to its rule by the certifications of blight.

Armstrong v. Manzo, 380 U.S. 545, dealing with an adoption question, is, of course, not the only pronouncement of your Honorable Court relating to the timeliness of a hearing in order to meet due process of law requirements. Other cases since *Armstrong* are collected in a footnote.[1]

Compare the values involved to the test laid down by Mr. Justice Brennan, concurring in the *Barry* case, *supra*, the horse trainer's license case, where he stated, "To be meaningful, an opportunity for a full hearing and determination must be afforded at least at a time when the potentially irreparable and substantial harm caused by a suspension can still be avoided—i.e., either before or immediately after suspension." 443 U.S. at 74.

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[1]*Barry v. Barchi*, 443 U.S. 55; *Bell v. Burson*, 402 U.S. 535; *Logan v. Zimmerman Brush Company*, 455 U.S. 422; *Sniadach v. Family Finance Corporation of Bay View*, 395 U.S. 337; *Wisconsin v. Constantineau*, 400 U.S. 433; *Fuentes v. Shevin*, 407 U.S. 67, reh den 409 U.S. 902; *Jenkins v. McKeithen*, 395 U.S. 411, reh den 396 U.S. 869; *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601; and *Parratt v. Taylor*, 451 U.S. 527.

It was too late in 1981 for the condemnees to challenge the ancient certifications.

II. The Public Importance Of The Issue Sought To Be Reviewed Is Great And Requires Quick Remedial Surgery By Your Honorable Court To Excise The Tumor Of The Pennsylvania Decision And To Prevent Its Spread To Other Parts Of The Body Politic.

The majority decision of the Pennsylvania Supreme Court in this case—which is totally inconsistent with the principles so well established by your Honorable Court—has now given broad immunity to every borough, city and county planning agency and redevelopment authority within the Commonwealth of Pennsylvania to do very much as it pleases with the planning device of blight certification.

After all, there can hardly be a more egregious case of abuse of due process than this case.

Nor are Pennsylvania property owners, tenants, business owners or business operators the only persons with cause to be concerned by the 4-3 vote of the Supreme Court of Pennsylvania. Citizens of each state in the union whose court of last resort might find the reasoning of the majority of the Pennsylvania Supreme Court in this case persuasive are similarly endangered.

For these reasons, certiorari should be granted.

CONCLUSION

Petitioners request that a writ of certiorari issue in this matter to the Supreme Court of Pennsylvania.

Respectfully submitted,

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(2)

91-625

No.

In the Supreme Court of the United States

OCTOBER TERM, 1991

E-V Company, a Partnership Composed of
Emil F. Kehr and Vincent E. Malone, and
Keller Office Equipment Company,
Petitioners,

v.

Urban Redevelopment Authority of Pittsburgh,
Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Pennsylvania

Appendix To Petition For A Writ Of Certiorari

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Appendix A

[J-146-1990]

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

IN THE MATTER OF: CONDEMNATION BY THE URBAN REDEVELOPMENT AUTHORITY OF PITTSBURGH OF CERTAIN LAND IN THE TWENTY-SECOND AND TWENTY-THIRD WARDS OF THE CITY OF PITTSBURGH, ALLEGHENY COUNTY, PENNSYLVANIA REDEVELOPMENT AREA NO. 39 (NORTH SHORE), BEING PROPERTY OF: E-V COMPANY, a partnership composed of Emil F. Kehr and Vincent E. Malone, or any other persons found to have an interest in the property, KELLER OFFICE EQUIPMENT COMPANY, PITTSBURGH HARLEY DAVIDSON, INC., formerly ALLEGHENY COUNTY DISTRIBUTORS, INC., a Pennsylvania corporation, or any other person found to have an interest in the property APPEAL OF: E-V COMPANY, a partnership composed of Emil F. Kehr and Vincent E. Malone, or any other persons found to have an interest in the property, and KELLER OFFICE EQUIPMENT COMPANY	No. 45 W.D. Appeal Docket 1989 Appeal from the Order of the Commonwealth Court, entered on July 8, 1988, at No. 821 C.D. 1986, affirming the Order of the Court of Common Pleas of Allegheny County, Civil Division, entered on February 21, 1986, at G.D. No. 81-27642 117 Pa. Commw. Ct. 475, 544 A.2d 87 (1988) ARGUED: September 24, 1990 RESUBMITTED: January 11, 1991

OPINION

JUSTICE ZAPPALA FILED: JULY 12, 1991

E-V Company and Keller Office Equipment Company (hereinafter condemnees) filed preliminary objections to a declaration of taking filed on October 9, 1981, by the Urban Redevelopment Authority of Pittsburgh (URA). Allegheny County Common Pleas Court overruled the objections and Commonwealth Court affirmed. We granted their petition for allowance of appeal limited to the questions: 1) "whether the condemnees have been unconstitutionally denied a meaningful hearing at a meaningful time to challenge the certification of blight...." and 2) "whether the taking is invalid for failure of the certification of blight process to comply with the requirements of the Local Agency Law." Put another way, the question before the Court is whether the Local Agency Law, or the Constitution, require a planning commission to notify property owners and hold hearings before determining that an area is appropriate for redevelopment according to the Urban Redevelopment Law, Act of May 24, 1945, P.L. 991, 35 P.S. §1701 et seq.

The Urban Redevelopment Law, 35 P.S. §1702(a), declares as a matter of legislative findings and policy that urban areas may become blighted because of: (1) unsafe, unsanitary, inadequate or over-crowded conditions of the dwellings in the particular area; (2) inadequate planning of the area; (3) excessive land coverage by the buildings in the area; (4) lack of proper light and air and open space; (5) the defective design and arrangement of the buildings in the area; (6) faulty street or lot layout; or (7) land uses in the area which are economically or socially undesirable. It further provides:

> (c) That the foregoing conditions are beyond remedy or control by regulatory processes in certain blighted areas, or portions thereof, and cannot be effectively dealt with by private enterprise under existing law without the additional aids herein granted and that such conditions exist chiefly in areas which are so subdivided into small parcels and in divided ownerships that their assembly for purposes of clearance, replanning and redevelopment is difficult and impossible without the effective public power of eminent domain.

35 P.S. §1702(c). When a planning commission certifies an area as a redevelopment area according to the foregoing standards, the redevelopment authority is empowered to prepare a plan for redeveloping that area for submission to the governing body. If the plan is approved, the authority or its agent may then proceed to implement the plan, including taking of property within the area by eminent domain.

On December 18, 1964, pursuant to a Basic Conditions Report[1], the Planning Commission of the City of Pittsburgh certified an area containing 203 acres located on the North Side of Pittsburgh as blighted within the meaning of the Urban Redevelopment Law. At that time, the area certified as blighted was called, for project purposes,

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[1]A Basic Conditions Report was defined by witness William B. Waddell (community planner with the City of Pittsburgh Planning Department, 1970-80) as "a report on the basic conditions of an area." (R.Rec. 1307a) Mr. Waddell explained that there are three sections to a Basic Conditions Report: First "is the basic conditions as they're recorded in line with a certain format of what the conditions are in an area." Second "is taking these conditions and analyzing them in relation to the seven conditions of blight as defined in the redevelopment law." Third "is . . . the recommendation based on that analysis of the redevelopment law." (R.Rec. 1307a)

the "Federal Anderson" area. Included in the "Federal Anderson" area were, among many others, properties located on Isabella Street in a block between the Sixth Street Bridge and Federal Street on the West and the Seventh Street Bridge and Sandusky Street on the East. After the Planning Commission certified the "Federal Anderson" area as blighted, no further action of any kind was taken by the Planning Commission or the URA with respect to the project.

On October 4, 1971, the City Planning Commission met and certified as blighted 90.8 acres located in the North Side of Pittsburgh. Approximately 63 of those acres were part of the 203 acres which previously had been certified as blighted in 1964. The revised 90.8 acres project was referred to as the "North Shore Project" area. Included among the 63 acres that was "recertified" as blighted were the Isabella Street properties between Federal Street and Sandusky Street which had been a part of the area certified as blighted in 1964.

Pursuant to 35 P.S. §1710 (a)-(c), the URA then prepared a redevelopment proposal for the North Shore project area. The proposal showed in detail the proposed method for redevelopment of the area, listed properties to be acquired during the first year of the project, and indicated that rehabilitation was to be a significant part of the redevelopment, mostly as private action with technical assistance provided by the URA. The proposal also provided that "Property will be acquired and cleared to: . . . provide developable parcels for redevelopment."

This redevelopment proposal was submitted to the Pittsburgh City Council, which held a public hearing on the proposal on April 12, 1972. The proposal was

approved by City Council on May 5, 1972, and the URA commenced implementing the proposal, over the next several years, acquiring and demolishing properties, applying for federal and state funds, and submitting modifications to the proposal.

The property on Isabella Street owned by the condemnee E-V Company, which is leased by condemnee Keller Office Equipment Company for the operation of its business, was included in the 203 acres certified as blighted in 1964 and in the 90.8 acres certified as blighted in 1971. That Isabella Street property included a four story building known as 32 Isabella Street, an eight story building known as 36 Isabella Street, and a two story building known as 38 Isabella Street. When E-V Company purchased the property in 1977, Keller Office Equipment Company moved from the four story building (32 Isabella Street) to the eight story building (36 Isabella Street). Eventually, in March of 1980 E-V Company sold the four story building. Later, in February, 1981, the two story building was sold. After the condemnee E-V Company had purchased the real estate and buildings in 1977, E-V Company continued to invest money in the property by remodeling the eight story building.

On October 9, 1981, the URA exercised the power of eminent domain and filed a declaration of taking in the Court of Common Pleas of Allegheny County, Pennsylvania, appropriating the properties located on Isabella Street in the North Shore project area, including the property of condemnee E-V Company which property housed the business of condemnee Keller Office Equipment Company at 36 Isabella Street. As stated, preliminary objections were filed. When the case was called for trial, it was ordered to

be tried by depositions. In due course various witnesses were subpoenaed and deposed and various documents were produced. Following the taking of depositions, the court filed an Adjudication and Order on February 21, 1986, denying appellants' preliminary objections. On appeal, the Commonwealth Court concluded that the trial court neither abused its discretion nor committed an error of law and, therefore, affirmed the order overruling the preliminary objections. We granted allowance of appeal, limited to the two questions set out above.

Treating the statutory issue first, the appellants argue that the taking of their property by eminent domain is invalid because the process by which the public purpose for the taking was established, the certification of blight, did not conform to the requirements of the Local Agency Law, originally enacted as the Act of December 2, 1968, P.L. 113, 53 P.S. §11301, effective January 1, 1969, now found at 2 Pa.C.S. §§101 and 102, Chapter 5, Subchapter B, and Chapter 7, Subchapter B. That Law provides that "[n]o adjudication of a local agency shall be valid as to any party unless he shall have been afforded reasonable notice of a hearing and an opportunity to be heard." 2 Pa.C.S. §553. An adjudication is defined as "any final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any or all parties to the proceeding in which the adjudication is made." 2 Pa.C.S. §101.

The Commonwealth Court has held that a planning commission's certification of blight is not an adjudication under Section 553 of the Local Agency Law, *Cass Plumbing & Heating Company v. PPG Industries, Inc.*, 52 Pa.

Commw. 600, 416 A.2d 1142 (1980). The appellants urge the adoption of the view set out in Judge Blatt's dissenting opinion in *Cass Plumbing*, that the action of certifying an area as blighted must be considered an adjudication because it exposes landowners to eminent domain and other powers of redevelopment authorities, which they would not have been exposed to otherwise.

We are of the view that a certification of blight does not, in and of itself, have a *legal* effect on property rights. It must be emphasized that a certification of blight does not necessarily lead to the taking of all, or even any, of the property in the certified area by eminent domain. The Urban Redevelopment Law recognizes "[t]hat certain blighted areas, or portions thereof, may require total acquisition, clearance and disposition . . . and that other blighted areas, or portions thereof, . . . may be susceptible to rehabilitation or conservation or a combination of clearance and disposition and rehabilitation or conservation . . . ." 35 P.S. §1702(c.1). Among the specific powers given to redevelopment authorities is the power "to initiate preliminary studies of possible redevelopment areas to make and assist in implementing (1) plans for carrying out a program of voluntary repair, rehabilitation and conservation of real property, buildings and improvements, [and] (2) plans for the enforcement of laws, codes and regulations relating to the use of land and the use and occupancy of buildings and improvements . . . ." 35 P.S. §1709(b). Indeed, the Law has recently been amended to explicitly give redevelopment authorities the power "[t]o make, directly or indirectly, secured or unsecured loans" and "[t]o make loans to or deposits with, . . . without requiring collateral security therefor, any financial institution" to

finance, among other things, rehabilitation of a redevelopment program. 35 P.S. §§1709(aa),(bb), as amended March 30, 1988, P.L. 304, No. 39. Thus, the mere designation of a redevelopment area does not inevitably lead to acquisition by eminent domain.[2]

Of equal significance to our finding that the certification itself does not affect property rights is the fact that the certification merely sets the stage for redevelopment of the area. The redevelopment authority must thereafter devise a plan and submit a detailed proposal to the governing body of the municipality. Only after the governing body has held public hearings and given its approval to the plan can the redevelopment authority take any action that affects property rights in the area. The planning commission's designation of a redevelopment area is thus seen as a preliminary or advisory matter.

The appellants also argue from evidence introduced by way of expert testimony that a certification of blight "affects property rights," and thus is an adjudication, because when it becomes public knowledge that an area has been certified as blighted, deleterious consequences befall landowners and business owners in that area. The testimony was to the effect that real estate, as well as equipment, machinery and fixtures situated are no longer readily saleable on the open market; it is difficult for property owners to obtain mortgages or other loans secured by real estate within the area certified as blighted; business and

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[2]In fact, the redevelopment proposal in the present case specifically declared that "rehabilitation is a significant part of the proposed redevelopment," and "for the most part, rehabilitation will be carried out as a program of private action." Unfortunately for the appellants, their particular piece of property was not one that could be rehabilitated consistent with the redevelopment program for the area.

residential tenants alike have a tendency to move from the area as soon as possible, often before the end of their lease terms, resulting in vacant and boarded-up buildings; and maintenance and repair of the structures within the area are usually neglected by the property owners, further affecting the real estate in a negative way.

Whatever the validity of this evidence, which was not referred to, much less credited, by the court in its findings of fact, it demonstrates only that property *interests may* be affected by subjective reactions to the certification. It does not establish that the legal *rights are* affected by the certification itself. Indeed, the experience of the parties to this action belies the claim they advance, for they asserted that following the initial certification of blight in 1964, and again following the 1971 certification, buildings were demolished, there was new construction, properties were bought and sold, and buildings were rehabilitated.[3] Although the appellants attempt to negate this fact by arguing that the expert's assessment applies only where a certification of blight is *generally known*, this reinforces the conclusion that the deleterious effects flow not from the certification itself but from speculative subjective reactions to it.

Our analysis of the appellants' constitutional argument follows a similar course. The appellants rely on *Armstrong v. Manzo*, 380 U.S. 545 (1965), as setting out the applicable interpretation of the due process guarantees—

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[3]If in fact the publicity surrounding a certification of blight has such a drastic effect on the property, and it appears inevitable at that early stage that the property will be condemned, the property owner has resort to the established law of de facto taking to remedy the loss. See *Conroy-Prugh Glass Co. vs. Commonwealth*, 456 Pa. 384, 321 A.2d 598 (1974).

that persons may not be deprived of their rights or property without a meaningful opportunity to be heard at a meaningful time, and that proceedings in which the burden of proof has been shifted are inadequate to protect the interests guarded by the due process clauses.[4]

The appellants argue that preliminary objections to a declaration of taking do not offer a meaningful opportunity to be heard at a meaningful time on the propriety of the certification of blight, especially in these circumstances, where nine and a half years passed between the certification and the declaration of taking of their property. They further argue that the ability to file preliminary objections is inadequate to cure the due process deprivation caused by lack of a hearing, since condemnees bear a heavy burden of proving fraud or abuse of discretion by the condemning body, which burden, it is suggested, they would

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[4]In that case, a step-father and his wife petitioned for the adoption of a child born of the wife and her previous husband. The petitioners alleged that the consent of the natural father was not necessary because he had failed to contribute to the support of the child for more than two years. The previous husband was not notified, and did not have the 'slightest inkling,' of the pending adoption proceedings. After the adoption had been approved, the natural father learned of the action and promptly filed a motion to set aside the adoption decree. The Texas courts recognized that the natural father was entitled to due process, but held that the failure to give him notice and an opportunity to be heard prior to the adoption had been cured by the hearing he received upon his motion to set aside the adoption. The Supreme Court reversed, reasoning that if the natural father had been given the timely notice to which he was entitled, the step-father and his wife (the child's mother), as the moving parties, would have had the burden of proof at any contested proceeding. After a decree of adoption had been entered, the natural father was faced with the affirmative burden of overcoming that adverse decree by one judge based upon a finding of nonsupport made by another judge.

not have borne at an earlier hearing. We cannot agree with this agrument in either respect.

The appellants suggest that planning commissions must hold public hearings to consider whether to certify an area for redevelopment, and that at such hearings the commission would have the burden of proving that the conditions necessary for invoking the Redevelopment Law existed. Such is clearly not the scheme provided in the Law itself, and the constitutional guarantees of due process cannot be stretched to hold that it is constitutionally required. As detailed above, we view the decision of the commission to designate an area for redevelopment as one that does not itself affect property rights. It is an internal decision made by a government body presumed to perform its duties in good faith and according to law. Planning commissions, like other government agencies are not required to conduct their decision-making process according to an adversarial model, bearing a burden of "proving" that their proposed actions conforms to the power delegated to them by their enabling legislation.

A comparison between the redevelopment process and the process for planning and building a new highway is instructive. The Department of Transportation is authorized to prepare and continually revise a "twelve year program" for construction and improvement of transportation systems. 71 P.S. §512(a)(13). Depending upon priorities and funding, the proposals included in such program may or may not be undertaken. Once a project has proceeded to the stage where a preliminary plan or design has been submitted that will require the acquisition of new or additional right-of-way, the Department is required to hold public hearings and consider the effects of the project

on a host of concerns. 71 P.S. §512(b) (1)-(23). Statutory newspaper notice of such hearings is sufficient, *In re Condemnation by Commonwealth Department of Transportation of Right of Way for Legislative Route 201, Section 5 R/W*, 22 Pa. Commw. 440, 349, A.2d 819 (1976). The Department is also required to make written findings that the project will not adversely affect those concerns or that there is no feasible and prudent alternative to such effects. *Id.* Persons aggrieved by any of the Department's findings in this regard may appeal to the Commonwealth Court, 71 P.S. §512(e), which reviews the actions of the Department under the "abuse of discretion" standard, *Snelling v. Department of Transportation*, 27 Pa. Commw. 276, 366 A.2d 1298 (1976).

Similarly, the Redevelopment Law provides for designation of areas in need of redevelopment as a first step, to be followed by preparation of detailed proposals for redevelopment, 35 P.S. §1710(a)-(c), submission of the proposals to the planning commission for recommendations, 35 P.S. §1710(e), and submission of the proposals and planning commission recommendations to the governing body for approval. Before deciding to approve or reject the proposal, the governing body is required to hold public hearings on the redevelopment proposal and give notice of such hearings by newspaper publication, 35 P.S. §1710(g).

Although the Redevelopment Law does not specifically provide for an appeal for persons aggrieved by a governing body's decision to accept a redevelopment proposal, this Court has held that an action will lie in equity to challenge a certification of blight. In *Crawford v. Redevelopment Authority*, 418 Pa. 549, 211 A.2d 866 (1965), the planning commission had certified a designated area as

being in need of redevelopment and had approved a proposal prepared by the redevelopment authority, which, after public hearings, was adopted by the city council and county commisssioners. The first issue the Court considered was "the propriety of an attack in equity of a Redevelopment Authority Certification that an area is blighted." *Id.*, at 553, 211 A.2d at . The ready answer was that "[w]e have long held that such an attack is proper when it is alleged and proven that the Authority, in making its certification, acted in bad faith, arbitrarily, or failed to follow a statutory requirement." *Id.*, citing *Oliver v. Clairton*, 374 Pa. 333, 98 A.2d 47 (1953). We emphasized, however, the limited scope of judicial review, stating that an authority's exercise of its discretion should not be disturbed "in the absence of fraud or palpable bad faith." *Id.*

Since a finding of blight is but the first step in a process that could have any number of effects, positive as well as negative, on the area and the individual properties within it, it does no more to "expose property to the powers of eminent domain" than does a highway department's preliminary plan to locate a highway in a given area.[5] The requirement that the governing body hold public hearings and give notice of those hearings by publication, prior to formal adoption of a proposal for redevelopment, is sufficient to satisfy the due process requirement that those affected have an opportunity to voice their objections. As noted, an action is available in equity for those aggrieved to challenge the certification until declarations of taking have been filed, at which point the same issue may be

[5]Indeed, in this sense it may be said that *all* property is "exposed to the power of eminent domain", Pa. Const. Art. 1, Sec. 10, subject only to the limitation that the government agency exercising that power must not do so arbitrarily or in bad faith.

litigated by way of preliminary objections to the taking. And since those objecting to the certification are required in any case to bear the heavy burden of overcoming the presumption that the authority performed its duties in good faith and according to law, the argument based on *Armstrong v. Manzo*, that preliminary objections to a declaration of taking are an inadequate cure because they shift the burden of proof, must fail. There is no deprivation to cure and the burden does not shift.

Because we find the procedures set out in the Redevelopment Law, the Eminent Domain Code, and the case law adequate under the Due Process Clause and the Local Agency Law to protect property interests at the initial stage of the redevelopment process where an area is certified as a redevelopment area, we affirm the Order of the Commonwealth Court.

Mr. Justice Larsen files a Dissenting Opinion in which Mr. Justice Papadakos joins.

Mr. Justice Flaherty files a Dissenting Opinion in which Mr. Justice Papadakos joins.

[J-146-1990]

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

IN THE MATTER OF: CONDEMNATION BY URBAN REDEVELOPMENT AUTHORITY OF PITTSBURGH OF CERTAIN LAND IN THE TWENTY-SECOND AND TWENTY-THIRD WARDS OF THE CITY OF PITTSBURGH, ALLEGHENY COUNTY, PENNSYLVANIA, REVEDELOPMENT AREA NO. 39 (NORTH SHORE), BEING PROPERTY OF: E-V COMPANY, a partnership composed of Emil F. Kehr and Vincent E. Malone or any other persons found to have an interest in the property KELLER OFFICE EQUIPMENT COMPANY, PITTSBURGH HARLEY DAVIDSON, INC., formerly ALLEGHENY COUNTY DISTRIBUTORS, INC., a Pennsylvania corporation, or any other person found to have an interest in the property. APPEAL OF E-V COMPANY, a partnership composed of Emil F. Kehr and Vincent E. Malone, or any other persons found to have an interest in the property, and KELLER OFFICE EQUIPMENT COMPANY.	No. 45 W. D. Appeal Docket 1989 Appeal from the order of the Commonwealth Court entered on July 8, 1988 at No. 821 C. D. 1986 affirming the Court of Common Pleas of Allegheny County, Civil Division Order of February 21, 1986 at G. D. No. 81-27642 117 Pa. Commw. Ct. 475, 544 A.2d 87 (1988) ARGUED Sept. 24, 1990 RESUBMITTED: January 11, 1991

DISSENTING OPINION

JUSTICE ROLF LARSEN FILED: JULY 12, 1991

I dissent.

The issues presented in this appeal are: (1) whether the appellants-condemnees, E-V Company and Keller Office Equipment Company, (hereinafter condemnees) have been unconstitutionally denied a meaningful hearing at a meaningful time to challenge the certification of blight which had exposed them to a condemnation proceeding, and (2) whether the taking is invalid for the failure of the certification of blight process to comply with the requirements of the Local Agency Law.

On December 18, 1964, the Planning Commission of the City of Pittsburgh certified an area incorporating 203 acres situated on the North Side of Pittsburgh as a blighted area within the meaning of the Urban Redevelopment Law, Act of May 24, 1945, P.L. 991, 35 P.S. §1701, et seq. The area certified as a blighted area in 1964 was referred to as the "Federal Anderson" area. Part of the 203 acres known as the "Federal Anderson" area were properties located on Isabella Street in the city block between the Sixth Street Bridge and Federal Street on the West and the Seventh Street Bridge and Sandusky Street on the East. The condemnees' property and business are located in that block.

The record indicates that no notice of the meeting of the Planning Commission that was held on December 18, 1964, was given, by personal service, newspaper advertisements, posting or otherwise, to any of the property owners, residents, tenants, business owners or business operators in the targeted area. On the contrary, the evidence suggests that in 1964, the Planning Commission met regularly at a designated time and generally did not give notice of its meetings. (R. Rec. 684a) Additionally, the record indicates that, in 1964, no hearing was held on the question of

whether the designated area was a blighted area within the meaning of the Urban Redevelopment Law, Act of May 24, 1945, P.L. 991, 35 P.S. §1701, et seq., and should be certified as such. (R. Rec. 166a & 167a)

After the Planning Commission certified the "Federal Anderson" area as blighted, no further action of any kind was taken by the Planning Commission or the Urban Redevelopment Authority with respect to the project. Subsequent to that certification of blight in 1964, conditions in the "Federal Anderson" area changed in that buildings in the "blighted" area were demolished (R. Rec. 357a & 358a), there was new construction in the "blighted" area (R. Rec. 358a), and there was rehabilitation of existing buildings in the "blighted" area. (R. Rec. 358a). Eventually, by 1971, the Basic Conditions Report of 1964, which led to the certification of blight in December, 1964, became outdated. (R. Rec. 1368a).

Through the years following the 1964 certification of blight, local government maintained an interest in redeveloping at least a part of the "Federal Anderson" area. Acting pursuant to that interest, the City Planning Commission met on October 4, 1971 and certified an area containing 90.8 acres located in the North Side of Pittsburgh as a blighted area. Approximately 63 of those 90.8 acres had been part of the 203 acres previously certified as blighted in 1964. The revised 90.8 acres redevelopment project was called the "North Shore Project" area. Again, there is no record of any notice having been given, by personal service, newspaper advertisement, posting or otherwise, to any property owners, residents, tenants, business

owners or business operators when the "North Shore Project" area was certified (part of which was "recertified") as blighted.

The property on Isabella Street which is leased by condemnee Keller Office Equipment Company for the operation of its business and which property is owned by the condemnee E-V Company, was included in the 90.8 acres certified as blighted in 1971 as well as in the 203 acres certified as blighted in 1964.[1] That Isabella Street property included a four story building known as 32 Isabella Street, an eight story building known as 36 Isabella Street, and a two story building known as 38 Isabella Street. When E-V Company purchased the property in 1977, Keller Office Equipment Company moved from the four story building (32 Isabella Street) to the eight story building (36 Isabella Street). Subsequently, condemnee E-V Company sold the four story building (32 Isabella Street) in March of 1980. The two story building (38 Isabella Street) was sold in February of 1981.

At the time condemnee E-V Company purchased the property in 1977, a title search was made and that search did not disclose the fact that the property was in a certified blighted area. Likewise, in 1980 and in 1981 when E-V Company subdivided the property and sold two of the buildings it had acquired in 1977 (32 Isabella Street and 38

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[1]Keller Office Equipment Company, a business corporation having two shareholders, Emil F. Kehr and Vincent E. Malone, purchased the office supply business in 1973 from the previous owner, Fred Keller. The business had been operated at the same Isabella Street location since at least 1965. (R. Rec. 706a). E-V Company, a partnership composed of Messers. Kehr and Malone, purchased the Isabella Street Property in 1977 from Lewis Enterprises, the previous landlord from whom Keller had leased its space.

Isabella Street), title searches were done in connection with each of those transfers. Neither of those title searches disclosed that the property and buildings being sold and transferred by E-V Company were located in an area certified as blighted. Additionally, when the sales in 1980 and 1981 were made, Condemnee, E-V Company, was required to submit a plan of subdivision to the appropriate local authorities which plan was officially approved without notice that the property was in an area certified as blighted.

After the condemnee E-V Company had purchased the real estate and buildings in 1977, E-V Company continued to invest money in the property by remodeling the eight story building. In connection with that remodeling work, it was necessary for the condemnee to obtain permits from the City of Pittsburgh in order to lawfully proceed with its plans. (R. Rec. 727a). Those permits were obtained without notice that the building the condemnee, E-V Company, was remodeling was located in an area which was certified as blighted.

There was testimony that since the original certification of blight in 1964, several new businesses had located in the "blighted" area and many of the buildings therein were renovated and remodeled. (R. Rec. 758a-769a & 921a-938a, Exhibit 45 & Exhibit 53) For example, in 1975, Pittsburgh Harley-Davidson, Inc. (Pittsburgh Harley), a condemnee in the lower court proceedings but not an appellant here, applied for and received permission from the Pittsburgh Board of Adjustment to erect an addition to its existing building on Isabella Street (in the block between Federal Street and Sandusky Street) which, unbeknownst to Pittsburgh Harley, was in the "North Shore Project" redevelopment area. Pursuant to the permission

received from the Board of Adjustment, Pittsburgh Harley obtained all of the necessary permits from the City of Pittsburgh and proceeded to erect the addition. All of this was accomplished without notice to Pittsburgh Harley that its property was in an area which had been certified as blighted.

In short, there was no notice given of the meeting of December 18, 1964, when the original 203 acres was certified as blighted. Following that 1964 meeting, there was no notice given to anyone affected by the certification that the designated area had been certified as blighted. Similarly, there was no notice given of the meeting of October 4, 1971, when the 90.8 acres of the North Shore Project was certified as blighted. Again, following that meeting, there was no notice given to anyone affected by the certification that the "North Shore Project" area, wherein the appellants' property and business are located, was certified or recertified as blighted. Further, neither the certification of blight made in 1964 nor the certification of blight made in 1971 was recorded in the Recorder's Office of Allegheny County where it would have served as notice and could have been discovered in a title search. The condemnees and/or their predecessors did not have the slightest inkling that their property and business was in an area certified as blighted and thus exposed to the powers of eminent domain.

On October 9, 1981, the Urban Redevelopment Authority of Pittsburgh exercised the power of eminent domain and filed a declaration of taking in the Court of Common Pleas of Allegheny County, Pennsylvania. That declaration of taking pertained to the "North Shore Project" area and included the property at 36 Isabella Street

owned by condemnee E-V Company, and leased by condemnee Keller Office Equipment Company for the operation of its office supply business. The condemnees filed preliminary objections to the declaration of taking and the case was assigned to the Honorable Maurice Louik for adjudication. Judge Louik filed an Adjudication and Order on February 21, 1986, in which he denied appellants' preliminary objections. Judge Louik characterized this case as a struggle of a small business to maintain its property in the face of the governmental exercise of eminent domain. He stated that upon the record there is a "clear appearance of inequality of treatment" with respect to the condemnees in this case. Judge Louik went on to say:

> "If left to our own discretion, we would sustain condemnees' preliminary objections, but under the standard enunciated by the Commonwealth Court, we cannot substitute our discretion for that of the Authority." (Louik, J., Adjudication and Order, February 21, 1986, p. 13)[2]

I.

First, the condemnees argue that the declaration of taking filed on October 9, 1981, based upon a certification of blight in 1971 which was, in part, a "recertification" of blight originally made in 1964, is void and of no legal effect. The condemnees base their argument on the failure

[2]The Commonwealth Court standard referred to and followed by the trial judge is set forth in *Matter of Condemnation by Urban Redevelopment Authority of Pittsburgh*, 92 Pa Commw. 602, 499 A.2d 1146 (1985), where the Commonwealth Court reiterated that absent proof that a certification of blight was arbitrary, capricious, made in bad faith or the product of an abuse of discretion, that the trial judge may not substitute his discretion for that of the agency regarding the conditions of blight.

of the Planning Commission to provide a "due process hearing" with respect to the certification of blight in 1964 and the "recertification" of blight in 1971.

The condemnees point out in their brief that the Urban Redevelopment Law, Act of May 24, 1945, P.L. 991, 35 P.S. §1701, et seq., does not specifically provide for notice and a hearing regarding a certification of blight. Furthermore, neither the Second Class City Code, Act of March 7, 1901, P.L. 20, as amended, 53 P.S. §22101, et seq., nor the Municipalities Planning Code, Act of July 31, 1968, P.L. 805, as amended, 53 P.S. §10101, et seq., specifically require notice and a hearing with respect to a certification of blight in delineating the powers and responsibilities of planning commissions. Nonetheless, the legislature's failure to make provision for notice and a hearing in those statutes does not negate the condemnees' right to due process. That right is guaranteed by the Constitutions of the United States and of Pennsylvania.

The Fifth Amendment of the United States Constitution provides:

> No person shall be . . . deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article 1, §10 of the Pennsylvania Constitution provides:

> [P]rivate property [shall not] be taken or applied to public use, without authority of law and without just compensation being first made or secured.

"The power of eminent domain, next to that of conscription of man power for war, is the most awesome grant of power under the law of the land." *Winger v. Aires,* 371 Pa.

242, 244, 89 A.2d 521, 522 (1952) It may never be exercised to appropriate private property except for public use. Almost 150 years ago this court said:

> The right of eminent domain does not authorize the government to take the property of the citizen for the mere purpose of transferring it to another, even for a full compensation, when the public is not interested in the transfer. Such an arbitrary exercise of power would be an infringement of the constitution, as not being within the power delegated by the people to the legislature.

Pittsburgh v. Scott, 1 Pa. 309, 314 (1845) Uses which are public uses sufficient to permit the exercise of eminent domain are to be determined by the legislature, subject to correction or restriction where it clearly appears that the right is abused. *Id.* at p. 314.

The legislature has enacted the Urban Redevelopment Law, 35 P.S. §1702(a) which declares as a matter of legislative findings and policy that urban areas become *blighted* because of: (1) unsafe, unsanitary, inadequate or overcrowded conditions of the dwellings in the particular area; (2) inadequate planning of the area; (3) excessive land coverage by the buildings in the area; (4) lack of proper light and air and open space; (5) the defective design and arrangement of the buildings in the area; (6) faulty street or lot layout; or (7) land uses in the area which are economically or socially undesirable. The Urban Redevelopment Law further provides, inter alia, as follows:

> (b) That such conditions or a combination of some or all of them have and will continue to result in making such areas economic or social liabilities, harmful to

the social and economic well-being of the entire communities in which they exist, depreciating values therein, reducing tax revenue, and thereby depreciating further the general community-wide values. (35 P.S. §1702(b))

(c) That the foregoing conditions are beyond remedy or control by regulatory processes in certain blighted areas, or portions thereof, and cannot be effectively dealt with by private enterprise under existing law without the additional aids herein granted and that such conditions exist chiefly in areas which are so subdivided into small parcels and in divided ownerships that their assembly for purposes of clearance, replanning and redevelopment is difficult and impossible without the effective public power of eminent domain. (35 P.S. §1702(c))

(c.1) That certain blighted areas, or portions thereof, may require total acquisition, clearance and disposition, subject to continuing controls as provided in this act, since the prevailing condition of decay may make impracticable the reclamation of the area by rehabilitation or conservation, and that other blighted areas, or portion thereof, through the means provided in this act, may be susceptible to rehabilitation or conservation or a combination of clearance and disposition and rehabilitation or conservation in such a manner that the conditions and evils hereinbefore enumerated may be eliminated or remedied. (35 P.S. §1702(c.1))

(d) That the replanning and redevelopment of such areas are in accordance with sound and approved plans for their redevelopment will promote the public health, safety, convenience and welfare. (35 P.S. §1702(d))

The legislature, in enacting the Urban Redevelopment Law, has declared that the clearance and redevelopment of a blighted area is a public use which justifies the exercise of the power of eminent domain and the expenditure of public monies. The key to the lawful exercise of eminent domain in an area designated for redevelopment is that the area is blighted as defined by the Urban Redevelopment Law. Once there is an official certification that an area is blighted, the way is clear for the exercise of eminent domain to acquire the properties within the certified area. The properties may then be transferred to a private redeveloper[3] who proceeds to redevelop the area under a contract with the Authority. Property owners in the redevelopment area are exposed to the involuntary loss of their property. Likewise, business owners who operate their businesses in the area stand to lose their businesses. These drastic consequences are made possible by an official certification that the neighborhood is in a blighted area notwithstanding the actual physical condition of the various properties.

John P. Robin, who served as the first Director of the Urban Redevelopment Authority of Pittsburgh from 1948 to 1955 and who, at the time of his testimony had been again serving as the Authority's Chairman since 1977, testified that when he became Chairman of the Redevelopment Authority for the second time, the "North Shore Project" was a high priority. (R. Rec. 1133a-1134a) Mr.

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[3]The Urban Redevelopment Law defines "Redeveloper" as: Any individual, government, partnership or public or private corporation that shall enter or propose to enter into a contract with an Authority for the redevelopment of an area, or any portion thereof, or any building or structure thereon, under the provisions of this act.

35 P.S. §1703(1).

Robin and his colleagues called upon various companies to seek advice and to develop interest in the proposed redevelopment project. The Authority discovered that the Mellon-Stuart organization, a company involved in real estate development and construction, had an interest in the redevelopment area. The North Shore area, because of its convenient location, was an attractive location. (R. Rec. 1135a) Mellon-Stuart indicated a desire to relocate its home office to that area. Eventually Mellon-Stuart was selected as the redeveloper. (R. Rec. 1135a-1136a)

Mr. Robin testified that the properties on Isabella Street had become the subject of the redevelopment proposal because those who had studied the area concluded that the blocks between the Sixth Street, Seventh Street and Ninth Street bridges spanning the Allegheny River between Pittsburgh's Golden Triangle and the North Side was the appropriate place to begin redevelopment of the North Shore area. (R. Rec. 1136a) Mr. Robin testified that:

> [The blocks of Isabella Street] were the ones that are most imediately adjacent to the built-up portion of the Golden Triangle and are part of the visibility and easily exchanged with the Triangle itself.
>
> Secondly, because they are compact blocks which each one (sic) can be handled as a unit. Third, because their acquisition was within the probable range of the Authority's financial capacity. But primarily because they were *opportunity blocks* in the area. (emphasis added).

(R. Rec. 1136a) Mr. Robin defined an "opportunity block" as:

> [A block] where you can have a chance of finding a developer. There's no point in proclaiming an entire city a redevelopment area and leaving it up to chance. You try to find specific redevelopment project points with the redevelopment area having defined that. So these blocks, in particular, this block between these two bridges, became the best opportunity for development.

(R. Rec. 1136a-1137a).

According to the witness Mr. Robin, the Pittsburgh Redevelopment Authority operated on the principle that once an area has been certified as blighted within the meaning of the Urban Redevelopment Law, the properties within that certified blighted area may be condemned and taken at any time up until the project has been certified as completed by the redeveloper and the Authority. (R. Rec. 142a). This means that the properties within the redevelopment area remain exposed to the powers of eminent domain until the redeveloper and the Authority say the project is complete.

The evidence indicated that the condemnees' property on Isabella Street was coveted by the redeveloper Mellon-Stuart. It appears that Mellon-Stuart desired to acquire the condemnees' property and erect a building thereon which would blend in with the planned construction of other buildings on adjacent tracts and become a part of its new headquarters. Interestingly, buildings nearby and similar to the building of the condemnee E-V Company, one as close as fifty feet away, were not taken by the Authority. These neighboring buildings, comparable to condemnee's

building, were privately rehabilitated by their owners. (See Findings of Fact No. 33, Adjudication, Louik, J., February 21, 1986) Apparently, the buildings in which private rehabilitation by the owners was permitted were not the objects of the redeveloper's desires and plans. Thus, those properties escaped condemnation and taking solely because of the private interests of the redeveloper.

Beginning in 1964 when, without notice, the condemnee E V Company's property on Isabella Street was part of the "Federal Anderson" area certified as blighted, and continuing in 1971 when, without notice, that same property was a part of the area recertified as blighted in the "North Shore Project", E-V Company's property was encumbered by that certification of blight. It was encumbered to the extent that it was exposed to the risk that, regardless of how well it was maintained or how it was improved, it could be condemned and taken under the power of eminent domain and turned over to a redeveloper for that redeveloper's private use.

The condemnees argue that the procedure used by the Redevelopment Authority in certifying and recertifying as blighted the area now known as the "North Shore Project" area was defective and thus, caused all steps later taken by the Authority to be void. The condemnees argue that they and/or their predecessors should have been afforded a "due process hearing" at the time when the Authority decided to certify the "Federal Anderson" area and then later the "North Shore Project" area as blighted. In advancing their argument the condemnees rely upon the requirements of due process enunciated by the U.S. Supreme Court in its opinion in *Armstrong v. Manzo,* 380

U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965). In *Armstrong vs. Manzo, supra,* the Court said:

> A fundamental requirement of due process is 'the opportunity to be heard.' *Grannis v. Ordean,* 234 U.S. 385, 394, 34 S.Ct. 779, 783. It is an opportunity which must be granted at a meaningful time and in a meaningful manner.

380 U.S. at 552. The condemnees argue that under *Armstrong v. Manzo, supra,* they and/or their predecessors were entitled to a meaningful hearing at a meaningful time on the question of whether the area in which their property and business are located was a blighted area within the meaning of the Urban Redevelopment Law. The appellee, Urban Redevelopment Authority of Pittsburgh, argues that the condemnees were afforded a meaningful hearing under the provisions of the Eminent Domain Code, 26 P.S. §406 which provides that the condemnee may, file preliminary objections to the declaration of taking.

> Preliminary objections shall be limited to and shall be the exclusive method of challenging (1) the power or right of the condemnor to appropriate the condemned property unless the same has been previously adjudicated; (2) the sufficiency of the security; (3) any other procedure followed by the condemnor; or (4) the declaration of taking . . .

26 P.S. §1-406(a). The Authority's position is that the hearing the condemnees had on the preliminary objections they filed in this case in 1981, and which objections were finally adjudicated in 1986, was a meaningful hearing at a meaningful time and satisfies the requirements of due process. I disagree.

It is clear that the elements of due process are notice and an opportunity to be heard. *Armstrong v. Manzo, supra, Fuentes v. Shevin,* 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed. 2d 556 (1972), *Martin v. Department of Environmental Resources,* 120 Pa. Commw. 269, 548 A.2d 675 (1988). It equally clear (and undisputed) that the condemnees and/or their predecessors did not receive notice (by personal service, advertisements, posting or otherwise) of the planning commission's intent to certify the "Federal Anderson" area in 1964 and then the "North Shore Project" area in 1971 as blighted. Additionally, it is equally clear (and undisputed) that the condemnees and/or their predecessors were not afforded an opportunity to be heard in 1964 nor in 1971 on the question of the certification of blight which directly and substantially affected their property. I would hold, therefore, that the condemnees and/or their predecessors were denied a meaningful hearing at a meaningful time to challenge the certification of blight which affected their property and property rights and exposed their property to condemnation.

The hearing granted to condemnees on their preliminary objections to the declaration of taking under 406(a) of the Eminent Domain Code fails to satisfy the requirements of due process.[4] Judicial review on the condemnees' preliminary objections is limited to proof by the condemnees

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[4]Our sister states New Jersey and New York both provide for public notice and hearing when a local government targets an area for redevelopment.

The New Jersey Blighted Area Act, N.J.S.A. 40:55-21.4 provides:

> The governing body or the planning board shall thereupon cause a hearing to be held at an appointed time and place for the purpose of hearing persons interested in, or who would be

(Continued on next page)

that the certification and/or recertification of blight was arbitrary and capricious and/or constituted fraud or an abuse of discretion on the part of the redevelopment authority. *Simco Stores v. Redevelopment Authority of Philadelphia,* 455 Pa. 438, 317 A.2d 610 (1974). The condemnees' burden in this regard is a heavy one indeed. *Id.*

If the condemnees and/or their predecessors had been given notice and an opportunity to be heard on the condition of blight in 1964 and again in 1971 when the question of blight was before the planning commission for certification, the commission, being the moving party, would have properly had the burden to establish that one or more of the conditions of blight, as defined by the Urban Redevelopment law, then and there existed. Additionally, the commission, as the moving party, would have properly had the burden of establishing that such conditions or a combination of some or all of those conditions had the effect of making the targeted area a social or economic liability, resulting in depreciated property values and reduced tax revenues; and such conditions were beyond the remedy and control of regulatory processes; and such conditions could not be effectively dealt with by private enterprises.

(Continued)

affected by, a determination that the area is a blighted area, as defined in this act, and who favor or who are against such a determination.

Section 40:55-21-5 provides for public notice of such hearing setting forth, inter alia, the boundaries of the area to be considered for a certification of blight.

The New York Urban Redevelopment Corporations Act, 41 C.L.S. Private Housing Finance Law §203 provides: "A planning commission may approve a development plan after a public hearing . . ." §203(g) sets forth the requirements of the notice of the public hearing to be held by the planning commission prior to approval of any development plan.

35 P.S. §§1702(b), 1702(c), 1702(c.1) and 1702(d), supra. Further, the commission, as the moving party, would have properly had the burden to prove that the condemnees' property and business were reasonably part of the area in which one or more of the statutory conditions of blight applied. The commission's witnesses could have been cross-examined and its evidence could have been thoroughly reviewed by the condemnees and their counsel. The condemnees could then rest on their cross examination of the commission's witnesses or introduce evidence of their own to contradict the assertions of the commission in opposing the proposed certification of blight, particularly as it affected condemnees' immediate neighborhood and property. The condemnees and/or their predecessors, whose property and property rights would be affected by the commission's planned certification of blight, properly could prevail without being required to *affirmatively* prove anything. This is contrasted with the heavy burden which *Simco Stores* places on the condemnees in contesting the certification of blight, after the fact, by preliminary objections to the declaration of taking.[5] This burden is often made more weighty by a long delay between the certification of blight and the declaration of taking as was the case here. The condemnees were faced with the distinct burden of proving that the certification of blight made in 1971 which, in material part, was a recertification of the certification blight made in 1964, was arbitrary, capricious, fraudulent or an abuse of discretion. During such a lapse of time, conditions change, witnesses, for many reasons,

[5]If there is to be a heavy burden, it should fall upon the governmental agency which proposes to take private property from one citizen and turn that property over to another citizen known as a redeveloper, for the redeveloper's private use.

become unavailable, evidence is lost and memories fade. Under *Simco Stores,* if the condemnees are unable to prove that the certification was arbitrary, capricious, fraudulent or an abuse of discretion, then the condemnation stands and the condemnees' property may be taken even though the commission may not have been able to establish any of the statutory conditions of blight at the time of the certification. Such a hearing is not a meaningful hearing at a meaningful time and thus fails to satisfy the requirements of due process.

II.

Next, the condemnees argue that the condemnation and taking is invalid in that they were not afforded a hearing concerning the certification of blight as required under the provisions of the Local Agency Law, 2 Pa. C.S.A. §101 et seq.[6]

Section 553 of the Local Agency Law provides:

> No adjudication of a local agency shall be valid as to any party unless he shall have been afforded reasonable notice of a hearing and an opportunity to be heard . . .

Act of 1978, April 28, P.L. 202, No. 53, §5, 2 Pa. C.S.A. §553 (Substantial reenactment of act of December 2, 1968 (P.L. 1133, No. 353), §4 (53 P.S. §11304)) The question,

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[6]As I noted above, the Urban Redevelopment Law, 35 P.S. §1701, et seq., fails to provide a procedure whereby the property owners in a neighborhood which the local government proposes to certify as blighted may be given notice and an opportunity to be heard. The Local Agency Law, 2 Pa. C.S.A. §101, et seq., was enacted to fill such a void and provide a forum and procedure where none otherwise exists. See *Boehm v. Board of Education of Pittsburgh,* 30 Pa. Commw. 468, 373 A.2d 1372 (1977).

thus, is whether the certifications of blight made by the planning commission in 1964 and again in 1971 constituted adjudications of a local agency.

"Local Agency" is defined by the Local Agency Law in §101 as: "A government agency other than a Commonwealth agency." "Government Agency" is defined in §101 as "Any Commonwealth agency or any political subdivision or municipal or other local authority, or any officer or agency of such political subdivision or local authority." The Planning Commission of the City of Pittsburgh is an agency of a local authority—the Urban Redevelopment Authority. As such, it is a "local agency" within the meaning of the Local Agency Law. Thus, any adjudication of the Pittsburgh Planning Commission is subject to the provisions of the Local Agency Law.

"Adjudication" is defined by the Local Agency Law in §101 as:

> Any final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any or all of the parties to the proceedings in which the adjudication is made. The term does not include any order based upon a proceeding before a court or which involves the seizure or forfeiture of property, paroles, pardons or releases from mental institutions.

The certifications of blight made by the planning commission with respect to the "Federal Anderson" area in 1964 and the "North Shore Project" area in 1971 were broad determinations or rulings by the commission affecting the property rights, privileges and immunities of the condemnees and/or their predecessors.

> The extensive powers of the Redevelopment Authority to condemn large areas of land, including those tracts of land which are safe, sanitary and prosperous but which happen to be within an otherwise blighted area, is entirely contingent on the Planning Commission's certification of the area as blighted. Section 9(i) of the Urban Redevelopment Law, 35 P.S. §1709(i). Because the landowners [and business owners] here would not have been exposed to the powers of the Redevelopment Authority but for the certification of blight, I believe that the certification constitutes a determination or ruling by an agency affecting the *property rights* or the *immunities* of the landowners [and business owners], and must therefore fall within the definition of an 'adjudication' under the Local Agency Law. 2 Pa. C.S.A. §101.

Cass Plumbing & Heating Co. v. PPG Industries, 52 Commw. 600, 416 A.2d 1142, 1149 (1980) (Blatt, J. Dissenting).

When the public learns that an area has been certified as blighted, deleterious consequences befall landowners and business owners in that area. There was testimony by condemnees' real estate expert that real estate, as well as equipment, machinery and fixtures situated in a certified blighted area, are no longer readily saleable on the open market; and it is difficult for property owners to obtain mortgages or other loans secured by real estate within the area certified as blighted. Further, business tenants and residential tenants alike have a tendency to move from the certified blighted area as soon as possible, often before the end of their lease terms resulting in vacant and boarded-up buildings. Maintenance and repair of the structures within

the area are usually neglected by the property owners, further affecting the real estate in a negative way. (R. Rec. 1034a-1035a). These are some of the effects on the property rights, privileges and immunities of property and business owners in an area certified as a blighted area.

The majority miminizes the effect a certification of blight has upon the property and business owners in the area certified. The majority concludes that even though a certification of blight may: (a) depress the marketability of the real estate and the equipment, machinery and fixtures located therein; (b) render it difficult to obtain financing of any kind that is secured by real estate in the certified area; (c) motivates tenants to flee the area, often before leases have expired, resulting in vacant and boarded-up buildings; and (d) result in property owners neglecting maintenance and repair of their buildings further depressing property values, these injurious conditions, nonetheless, do not establish that legal rights are affected by the certification itself.[7] The majority ignores the obvious. Prior to the certification of blight in 1964 ("Federal Anderson Area") and recertification of blight in 1971 ("North Shore Project Area"), the property within the respective project areas could not be condemned and taken by local government

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[7]The majority observes that the deletrious effects which the appellants' expert testified was caused by a certification of blight applies only where such a certification is generally known. This, the majority says "reinforces the conclusion that the deleterious effects flow not from the certification itself but from speculative subjective reactions to it." (Slip Opinion, p. 9) The majority's observation neglects to take into account that notification to the property and business owners in the targeted area along with a hearing on the question of blight may very well result in the government failing to prove blight. Further, due process must not be sacrificed on the altar of secrecy so that reactions to a certification of blight by the citizenry may be avoided.

and then transferred to a private redeveloper for that redeveloper's private use. After the certification of blight in 1964 and the recertification in 1971, the property within the area certified as blighted was now lawfully exposed to condemnation and taking for redevelopment and use by a private redeveloper. As the majority points out, among the powers given to redevelopment authorities is the power to make and implement plans for a program of voluntary repair and rehabilitation of the real estate and buildings within the certified area. This results in allowing the private redeveloper to pick and choose the locations within the certified area the redeveloper wishes to redevelop and/or use for the redeveloper's own private purposes. In this case the private redeveloper, Mellon-Stuart, chose to relocate its own business offices to the property owned by appellant E-V Company and occupied by appellant Keller Office Equipment Company. There is no question that a certification of blight is a decision, determination or ruling affecting property rights, privileges and immunities and thus is an adjudication within the meaning of the Local Agency Law.

Judge Blatt observed in her dissent in *Cass Plumbing & Heating Co. v. PPG Industries, Inc.*, supra:

> [T]he entire scheme for the certification of an area as blighted is weighted against the landowners [and business owners] in favor of the condemnor, leaving the Redevelopment Authority 'with unbounded, unfettered and limitless discretionary power to appropriate and condemn as dilapidated . . . *as large an area as they believe can be made more prosperous.*' (citation omitted)

Id. at p. 60, 416 A.2d at p. 1150. A property owner who owns sound and well maintained property in a flourishing neighborhood may become exposed to condemnation for the purposes of redevelopment merely because his property is located in an "opportunity block" as defined in the testimony of John P. Robin cited *supra.* These kind of blocks are included in a certification of blight regardless of how well maintained they may be and notwithstanding that the statutory criteria of blight does not apply to them standing alone. Mr. Robin's testified that "opportunity blocks" are made part of a redevelopment package area as an inducement to attract redevelopers. (See testimony of John P. Robin, R. Rec. 1136a-1137a).

We are treading on dangerous ground when we permit, in this country, one party to take another's property merely because that party "justs wants to have it." "A man's home and property used to be his castle." *Cass Plumbing & Heating Co. v. PPG Industries, Inc.,* 488 Pa. 564, 565, 412 A.2d 1376, 1377 (1980) (Dissenting Opinion, Larsen J., joined by Flaherty, J.). When the government wishes to commence a procedure which ultimately leads to dispossessing a property owner of his "castle", the government's action must meet the requirements of due process by giving such property owner timely notice and a meaningful opportunity to be heard.[8] I thus would hold that the

[8]Timely notice and an opportunity to be head are mandated by the Historic Preservation Act, 1988, May 26, P.L. 414, No. 72, 37 Pa. C.S.A. §501 et seq., where the government proposes to designate private property for inclusion on the Pennsylvania Register of Historic Places. Section 503 of that Act provides:

> The owner of private property of historic, architectural or archaeological significance, or a majority of the owners of private properties within a proposed historic district, shall be given the

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condemnation and taking of condemnees' property and business in this case is a nullity for failure of the government to afford the condemnees reasonable notice and an opportunity to be heard in accordance with the Local Agency Law.

I would reverse the order of the Commonwealth Court.

Mr. Justice Papadakos joins in this dissenting opinion.

(Continued)

opportunity to concur in, or object to, the nomination of the property or proposed district for inclusion on the Pennsylvania Register of Historic Places. If the owner of the property, or a majority of the owners of the properties within the proposed historic district, object to the inclusion, the property shall not be included on the register.

37 Pa. C.S.A. §503.

[J-146-1990]

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

In the Matter of: CONDEMNATION BY THE URBAN REDEVELOPMENT AUTHORITY OF PITTSBURGH OF CERTAIN LAND IN THE TWENTY-SECOND AND TWENTY-THIRD WARDS OF THE CITY OF PITTSBURGH ALLEGHENY COUNTY, PENNSYLVANIA REDEVELOPMENT AREA NO. 39 (NORTH SHORE), BEING PROPERTY OF: E-V COMPANY, a partnership composed of Emil F. Kehr and Vincent E. Malone, or any other persons found to have an interest in the the property, KELLER OFFICE EQUIPMENT COMPANY, PITTSBURGH HARLEY DAVIDSON, INC., formerly, ALLEGHENY COUNTY DISTRIBUTORS, INC., a Pennsylvania corporation, or any other person found to have an interest in the property APPEAL OF: E-V COMPANY, a partnership composed of Emil F. Kehr and Vincent E. Malone, or any other persons found to have an interest in the property, and KELLER-OFFICE EQUIPMENT COMPANY	No. 45 W.D. Appeal Docket 1989 Appeal from the Order of the Commonwealth Court, entered on July 8, 1988, at No. 821 C.D. 1986, affirming the Order of the Court of Common Pleas of Allegheny County, Civil Division, entered on February 21, 1986, at G.D. No. 81-27642 117 Pa. Commw. Ct. 475, 544 A.2d 87 (1988) ARGUED: September 24, 1990 RESUBMITTED: January 11, 1991

DISSENTING OPINION

MR. JUSTICE FLAHERTY FILED: JULY 12, 1991

The majority sanctions the wielding of unchecked governmental power over the rights of property owners for

a purpose not traditionally governmental, i.e. taking from one to give to another. At the least minimal due process would require the opportunity for one whose property is to be placed in jeopardy to be heard on the issue of blight which will conclusively determine whether a prospective taking is for a governmental purpose sufficient to invoke the power of eminent domain. I sense the majority is adopting an "end justifies the means" approach and I view it as a dangerous precedent. I dissent.

Mr. Justice Papadakos joins in this dissenting opinion.

SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

IN THE MATTER OF: CONDEMNATION BY THE URBAN REDEVELOPMENT AUTHORITY OF PITTSBURGH OF CERTAIN LAND IN THE TWENTY-SECOND AND TWENTY-THIRD WARDS OF THE CITY OF PITTSBURGH, ALLEGHENY COUNTY, PENNSYLVANIA REDEVELOPMENT AREA NO. 39 (NORTH SHORE), BEING PROPERTY OF: E-V COMPANY, a partnership composed of Emil F. Kehr and Vincent E. Malone, or any other persons found to have an interest in the property, KELLER OFFICE EQUIPMENT COMPANY, PITTSBURGH HARLEY DAVIDSON, INC., formerly ALLEGHENY COUNTY DISTRIBUTORS, INC., a Pennsylvania corporation, or any other person found to have an interest in the property APPEAL OF: E-V COMPANY, a partnership composed of Emil F. Kehr and Vincent E. Malone, or any other persons found to have an interest in the property, and KELLER OFFICE EQUIPMENT COMPANY	No. 45 W.D. Appeal Docket 1989 Appeal from the Order of the Commonwealth Court, entered on July 8, 1988, at No. 821 C.D. 1986, affirming the Order of the Court of Common Pleas of Allegheny County, Civil Division, entered on February 21, 1986, at G.D. No 81-27642 117 Pa. Commw. Ct. 475, 544 A.2d 87 (1988) ARGUED: September 24, 1990 RESUBMITTED: January 11, 1991

JUDGMENT

ON CONSIDERATION WHEREOF, it is now ordered and adjudged by this Court that the judgment of the COMMONWEALTH COURT OF PENNSYLVANIA be, and the same is, hereby affirmed.

/s/ IRMA T. GARDNER

Irma T. Gardner
Deputy Prothonotary

Dated: July 12, 1991

IN THE COMMONWEALTH COURT
OF
PENNSYLVANIA

IN THE MATTER OF:

CONDEMNATION BY URBAN REDEVELOPMENT AUTHORITY OF PITTSBURGH ETC.

E-V COMPANY, a partnership composed of EMIL F. KEHR and VINCENT E. MALONE and KELLER OFFICE EQUIPMENT COMPANY,

Appellants

NO. 821 C.D. 19

BEFORE: HONORABLE JAMES CRUMLISH, JR., President Judge
HONORABLE JOHN A. MacPHAIL, Judge
HONORABLE FRANCIS A. BARRY, Judge
HONORABLE JAMES GARDNER COLINS, Judge
HONORABLE MADALINE PALLADINO, Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DORIS A. SMITH, Judge

ARGUED: March 23, 1988

OPINION

OPINION BY FILED: July 8, 1988
PRESIDENT JUDGE CRUMLISH, JR.

E-V Company and its lessee Keller Office Equipment Company (hereinafter collectively referred to as "Condemnees") appeal an Allegheny County Common Pleas Court order overruling their preliminary objections to the declaration of taking filed by the Urban Redevelopment Authority of Pittsburgh (Authority).

E-V, a partnership whose principals are also the shareholders of Keller, purchased the subject property in 1977, allegedly without notice that it was situated within an area certified as blighted since 1964.

The City of Pittsburgh Planning Commission (Commission) originally issued a certificate of blight in 1964 for portions of the Lower North Side section of the City as a step in the ongoing "Pittsburgh Renaissance." However, no redevelopment activity was taken pursuant to this certification.

In October 1971, the Commission issued a new blight certificate for portions of the same area, which included the condemnees' property. This newly certified section became known as the North Shore Redevelopment Area. Pursuant to the latter certification, and in compliance with the statutory scheme set forth in the Urban Redevelopment Law, Act of May 24, 1945, P.L. 991, *as amended*, 35 P.S. §§1701-1719, the Authority prepared the North Shore Redevelopment Proposal and submitted it to the Commission for review. The Commission approved the Proposal and authorized its submission to the City Council of Pittsburgh (Council). After a public hearing in April 1972,

Council voted to approve the Proposal on May 5, 1972, thereby empowering the Authority to take such action as may be necessary for its implementation.

The Authority engaged in various redevelopment activities throughout the following years, and in October 1981, filed the instant declaration of taking for the property. The Condemnees filed preliminary objections which essentially challenged the propriety of the blight certification and the constitutionality of the certification and condemnation procedures under due process principles of the United States and Commonwealth Constitutions. After submission of deposition testimony and exhibits, the trial court overruled the preliminary objections. Condemnees presently appeal to this Court.

Our scope of review in eminent domain cases is limited to a determination of whether the trial court's decision evidences an abuse of discretion or error of law. *Spory Appeal*, 54 Pa. Commonwealth Ct. 17, 419 A.2d 804 (1980). With respect to judicial review in redevelopment authority condemnation cases, the Pennsylvania Supreme Court stated in *Crawford v. Redevelopment Authority of County of Fayette*, 418 Pa. 549, 554, 211 A.2d 866, 868 (1965):

> The power of discretion over what areas are to be considered blighted is solely within the power of the Authority. The only function of the courts in this matter is to see that the Authority has not acted in bad faith; to see that the Authority has not acted arbitrarily; to see that the Authority has followed the statutory procedures in making its determination; and finally, to see that the actions of the Authority do not violate any of our constitutional safeguards.

(as quoted in *Goodwill Industries of Central Pennsylvania, Inc. Appeal*, 30 Pa. Commonwealth Ct. 273, 276, 373 A.2d 774, 776 (1977)).

The Condemnees' primary contention is that the common pleas court hearing provided after the declaration of taking—almost ten years after the blight certification[1]—does not satisfy due process standards in that it was not afforded at a "meaningful time and in a meaningful manner," *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). They argue that the substantial time lapse rendered an effective challenge to the certification practically impossible because there are no available witnesses with firsthand knowledge who are able to recall the planning and certification processes.

Without specifically delineating the requirements of due process owed to all property owners affected by a blight certification, we conclude that the process afforded the Condemnees in this case did not violate their constitutional rights.

First, we emphasize that this is not a case where the condemnees were denied all opportunity to challenge the blight certification. The Condemnees were given the opportunity to meet their burden of proving that the certification was arbitrary, capricious or made in bad faith.[2]

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[1]At the outset, we conclude that the relevant certification for the purposes of determining the legal issues in this case is the 1971 certificate of blight. Although the subject property was within the area previously certified in 1964, we deem that certification to have been superseded by the 1971 certification.

[2]The Condemnees contend, *inter alia*, that Keller was not served with the declaration of taking within thirty days of its filing, as required by Section 405 of the Eminent Domain Code, Act of June 22, 1964,

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They had eleven months subsequent to the declaration of taking to obtain discovery but sought only to review the Authority's files and to take the deposition of the Authority's engineering consultant, Kenneth Ira Britz. The Condemnees' bare assertions, without substantiation, that critical witnesses are unavailable or unable to competently testify about the 1971 certification are insufficient for us to conclude that there was an unconstitutional violation of due process.

The Condemnees' argument is further weakened by the fact that the Authority produced, and the Condemnees cross-examined, at least two witnesses who were intimately involved with the certification activities and decision-making process.

The first witness was William Waddell, a City Planning Department employee since 1965 and who in 1970 was appointed "city planner" for the City's section encompassing the North Shore Redevelopment Area. He indicated that the Planning Department was in effect the staff which performed the field work for the Commission. In this position, Mr. Waddell acted as the direct liaison between the Planning Department, the Authority and the North Shore community on redevelopment activities

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(Continued)

Spec. Sess., P.L. 84, *as amended*, 26 P.S. §1-405. The Authority sought to cure this procedural problem by obtaining a subsequent reinstatement of the declaration with service on Keller within thirty days thereof. While the Eminent Domain Code does not provide for such a procedure, we decline to hold that the taking is invalid for lack of timely service. It is undisputed that E-V was properly served and that the partners of E-V and the shareholders of Keller are one and the same. Under these circumstances, where Keller points to no resultant prejudice, we deem this to be of no consequence.

during the certification period.[3] More importantly, he personally prepared the "Basic Conditions Report" which analyzed and made recommendations as to whether the area's conditions met the blight criteria set forth in the Urban Redevelopment Law, 35 P.S. §1702.[4] This report formed the basis of the Planning Commission's decision to issue the certificate of blight.

There was also the testimony of Jan Krygowski, a Planning Department employee during the pre-certification period and the Planning Director of the Authority in 1970, with responsibility for all redevelopment planning activities. Significantly, Mr. Krygowski was involved with the start-up phase of the North Shore redevelopment project.[5] He personally gathered data and conducted studies on the North Shore area during the certification period.[6] Like Mr. Waddell, Mr. Krygowski was present at the Planning Commission meetings, as well as the community meetings conducted during the certification process.

In addition, the Condemnees had access to all of the Authority's files pertaining to the North Shore redevelopment project, including memoranda and studies relied upon in the blight certification process.

Following our thorough review of the record testimony and evidence, we can discern no indication that the mere lapse of time has so disabled the Condemnees in proving their allegations as to rise to the level of a constitutional violation.

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[3]Deposition of William B. Waddell, 11/17/82, pp. 12-14.

[4]*Id.* at pp. 14-18.

[5]Deposition of Jan Krygowski, 11/20/82, pp. 20-21.

[6]*Id.* at 31-32.

The Condemnees next contend that substantial changes and renewed vitality in the area since 1971 render the blight certification "stale." Thus, they argue, the certification is an improper basis for the condemnation. They suggest that there should have been an updated determination of blight nearer in time to the taking. They also argue that the Authority abandoned the redevelopment project sometime after the blight certification and is therefore estopped from acting pursuant to it.

We must reject these contentions inasmuch as they fail to recognize the trial court's findings that establish that the Authority *continually* engaged in redevelopment activities throughout the post-certification period and up to the time of the present taking. *In the Matter of: Condemnation By Urban Redevelopment Authority of Pittsburgh* (No. GD 81-27642 Allegheny County Common Pleas Civil Division, filed February 21, 1986), slip op. at 5. Moreover, the broad eminent domain powers vested in redevelopment authorities, 35 P.S. §1712, requires recognition that urban renewal cannot be accomplished overnight. As we stated in *Leo Realty Co. v. Redevelopment Authority of Wilkes-Barre*, 13 Pa. Commonwealth Ct. 288, 292, 320 A.2d 149, 152 (1974):

> It is well recognized that urban renewal takes place over long periods of time and through many stages of development. That part of a city which may have no need of redeveloping today may be in dire need four years later.

In the instant case, the Authority produced uncontradicted evidence that the area was blighted in 1971.[7] Although changes occurred during the following years it is the object of urban renewal to produce such changes and enhance the conditions of the redevelopment area. Hence, we cannot accept the Condemnees' assertion that the alleged changes required an updated certification in this case.

The Condemnees next contend that the Commission failed to act with deliberate, objective and unbiased judgment in issuing the blight certification in that it simply "rubber stamped" the recommendations of the planning staff. However, the Condemnees have failed to overcome the presumption that the Commission performed its duties in good faith. *Simco Stores v. Redevelopment Authority of Philadelphia*, 455 Pa. 438, 442, 317 A.2d 610, 613 (1974). Moreover, the testimony supports the findings that the Commisson had access to numerous blight studies and reports upon which to base its determination, and that the Commission did not engage in arbitrary or capricious conduct.

We likewise reject the contention that the certification is void for vagueness due to the absence of specific and detailed findings by the Commission to support its determination. There is no statute or regulation requiring such findings. Moreover, such findings would serve no purpose inasmuch as the narrow judicial scope of review precludes

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[7]The Authority produced the expert testimony of Mr. Krygowski, who offered his opinion supporting the Commission's determination that the North Shore area was in fact "blighted" in 1971. Deposition of Jan Krygowski, 11/20/82, pp. 51-52. In view of Mr. Krygowski's testimony, we also reject the Condemnees' separate contention that the Authority failed to show that the certified area was in fact blighted.

inquiry into the wisdom of the Commission's determination of blight. *Crawford.*

As an alternative to their procedural due process arguments, the Condemnees contend that the Commission's blight certification constitutes an "adjudication" affecting property rights which, under the Local Agency Law, 2 Pa. C.S. §§105, 551-595, 751-754, requires notice, a record hearing and a written decision supported by specific findings and reasoning.

We addressed this issue in *Cass Plumbing & Heating Co. v. PPG Industries, Inc.*, 52 Pa. Commonwealth Ct. 600, 416 A.2d 1142 (1980). Therein, we agreed with the trial court's conclusion that a mere certification of blight is not an adjudication within the meaning of the Local Agency Law. *Id.*, 52 Pa. Commonwealth Ct. at 613, 416 A.2d at 1149. In so holding, we noted that the condemnees' challenge to the blight certification could be fully litigated through the procedures provided under the Eminent Domain Code—i.e. the filing of preliminary objections to the declaration of taking. *Id.* That same procedure is available to the Condemnees in this case. As we stated in *Boehm v. Board of Education of School District of Pittsburgh*, 30 Pa. Commonwealth Ct. 468, 474, 373 A.2d 1372, 1375 (1977), "[t]he Local Agency Law . . . was enacted to provide a forum for the enforcement of statutory rights *where no procedure otherwise exists* . . . . " (Citation omitted; emphasis added). We confirm our ruling in *Cass* and conclude that the Local Agency Law is inapplicable to the present case.

The Condemnees next contend that the taking is invalid because of impermissible discrimination in rehabilitation selection. They argue that they were denied the

opportunity to rehabilitate their property as an alternative to condemnation. This contention, however, is simply not borne out by the record testimony and the caselaw. The Authority is not required to offer self-rehabilitation in every case, *Nixon Hotel, Inc. v. Redevelopment Authority of Butler*, 11 Pa. Commonwealth Ct. 519, 315 A.2d 366 (1974), but its decision to condemn must be based upon a proper public purpose, *Goodwill*. The testimony of John P. Robin, Chairman of the Authority, supports the trial court's conclusion that the underlying reason for the condemnation was to effect the purpose of implementing redevelopment in the area.[8] Our review of the record discloses no indication that the Authority impermissibly denied the Condemnees any entitlement they may have to self-rehabilitation of their property.

The Condemnees' final contention is that the taking is invalid because the redevelopment proposal, which was cited in the Declaration of Taking as the justification for the condemnation, did not include their property on the list of properties to be acquired.[9]

Although the Condemnees' property was not on the above-referenced list we deem this to be insignificant for the purpose of determining the validity of the taking. The Authority's chief consultant, Kenneth Britz, explained that the only purpose of this list was to reflect properties to be

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[8]Deposition of John P. Robin, 10/29/82, pp. 27-45.

[9]This issue was raised in the Condemnees' amended preliminary objections. The Authority contends that since the Condemnees failed to seek consent of counsel or leave of court to file the amended pleading, this issue was waived. We tend to agree with the Authority's position. Nonetheless, since our disposition of the issue will not affect the outcome of the case, and since the trial court found as facts that the amended pleading was filed and that the property was not on the above-referenced list, we will address the issue.

acquired *in that given year* in order to receive federal funds for that year.[10] Moreover, the testimony of Jan Krygowski establishes that the property was contemplated for acquisition since the inception of the redevelopment project.[11]

Since we conclude that the trial court committed no error of law or abuse of discretion, we affirm the order overruling Condemnees' preliminary objections.

/s/ JAMES CRUMLISH, JR.
James Crumlish, Jr.
President Judge

Date: July 8, 1988

[10]Deposition of Kenneth Ira Britz, 10/1, 5, 6, 13/82, pp. 15-16.
[11]Deposition of Jan Krygowski, 11/20/82, pp. 60-62.

IN THE COMMONWEALTH COURT
OF
PENNSYLVANIA

IN THE MATTER OF:

CONDEMNATION BY URBAN REDEVELOPMENT AUTHORITY OF PITTSBURGH ETC.

E-V COMPANY, a partnership composed of EMIL F. KEHR and VINCENT E. MALONE and KELLER OFFICE EQUIPMENT COMPANY,

Appellants

NO. 821 C.D. 1986

ORDER

The order of the Allegheny County Common Pleas Court, No. GD 81-27642 dated February 21, 1986, is affirmed.

/s/ JAMES CRUMLISH, JR.
James Crumlish, Jr.
President Judge

Date: July 8, 1988

CERTIFIED FROM THE RECORD
AND ORDER EXIT
July 8, 1988

/s/ C. R. HOSTUTLER
Deputy Prothonotary/Chief Clerk

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

IN THE MATTER OF: CONDEMNATION BY URBAN REDEVELOPMENT AUTHORITY OF PITTSBURGH OF CERTAIN LAND IN THE TWENTY-SECOND AND TWENTY-THIRD WARDS OF THE CITY OF PITTSBURGH, ALLEGHENY COUNTY, PENNSYLVANIA REDEVELOPMENT AREA NO. 39 (NORTH SHORE), BEING PROPERTY OF:	CIVIL DIVISION NO. G.D. 81-27642 ADJUDICATION AND ORDER LOUIK, J.
E-V COMPANY, a partnership composed of Emil F. Kehr and Vincent E. Malone, or any other persons found to have an interest in the property, KELLER OFFICE EQUIPMENT COMPANY, PITTSBURGH HARLEY DAVIDSON, INC., formerly Allegheny County Distributors, Inc., a Pennsylvania Corporation, or any other person found to have an interest in the property.	Copy of Adjudication and Order sent to: George R. Specter, Esquire Thomas J. Dempsey, Esquire

ADJUDICATION

LOUIK, J.

The eminent domain matter before the Court consists of consolidated actions G.D. 81-27640, 81-27641 and 81-27642. The pending takings relate to the North Shore Revelopment Area in the 22nd and 23rd Wards of Pittsburgh. In September, 1982, the parties were ordered to try the case by deposition. Between September 24, 1982, and February 28, 1983, nineteen depositions were taken. This court has reviewed the depositions, along with the extensive briefs and the exhibits filed by both parties, as well as the suggested Findings of Fact and Conclusions of Law. The main issues involved in this case turn on the fact that the taking of these properties was effected in 1981, although there was an original certification of blight of this redevelopment area as early as 1964. In 1971, the U.R.A. certified as blighted an area which included a portion of that originally certified area. As a result of the substantial time lapse between these events, the Condemnees allege that the takings are void as being arbitrary, capricious and in bad faith; in violation of Due Process; impermissibly premised upon private gain rather than public benefit, as well as being stale and abandoned. In addition, condemnees assert that there has been an unconstitutional discrimination regarding acquisition and rehabilitation selection. With a view towards these issues, the court finds the following facts:

FINDINGS OF FACT

(1) E-V Company, a partnership between Emil F. Kehr and Vincent E. Malone, owned the property which

is the subject of the pending condemnation action on October 9, 1981.

(2) The Urban Redevelopment Authority (hereinafter URA) filed a taking against the property of E-V Co., or others having an interest in it on October 9, 1981.

(3) Although the lease was unrecorded, the E-V Co. in fact was leasing the subject property to Keller Office Equipment Co., the shareholders of which were Emil F. Kehr and Vincent E. Malone on October 9, 1981.

(4) Within 30 days of the filing of the Declaration of Taking, it was served on E-V Company and E-V also filed preliminary objections to the Declaration of Taking within that same period of time.

(5) URA obtained a reinstatement of the Declaration of Taking, and served the same on Keller Office Equipment Co., on May 13, 1982.

(6) Condemnees filed amended Preliminary Objections on September 16, 1982, to which the URA filed an Answer and New Matter.

(7) The Redevelopment Area which is the subject of this case is Redevelopment Area No. 39 (North Shore), located in the 22nd and 23rd Wards of the City of Pittsburgh, Allegheny County, Pennsylvania.

(8) The Redevelopment Area consists of approximately 90.8 acres of land, including Isabella Street, and property there acquired by E-V Company.

(9) This area was the subject of an on-going blight study conducted by the City of Pittsburgh.

(10) At a meeting on December 18, 1964, the City of Pittsburgh's Planning Commission issued a certificate of blight for a different but overlapping area, also known as "The Lower North Side Study Area."

(11) That area consisted of 203 acres of land, also in the 22nd and 23rd Wards of the City of Pittsburgh.

(12) On October 4, 1971, the City Planning Commission certified the 90.8 acres of land as blighted, and this land included 63 acres which were part of the 1964 blight certification.

(13) That 63 acres has also been termed "recertified", which is simply a way of stating it was included in the 1971 certification.

(14) The URA Board prepared the North Shore Redevopment Proposal which was approved March 3, 1972.

(15) The City Planning Commission approved the Redevelopment Proposal on March 10, 1972.

(16) The City Council of Pittsburgh held a public hearing on the Proposal on April 12, 1972.

(17) This Proposal was approved by City Council on May 5, 1972.

(18) Documents available to the Planning Commission in connection with its blight study included the following:

(a) April, 1954, North Side Study performed by Pittsburgh Regional Planning Association and Pittsburgh City Planning Commission.

(b) Lower Northside Basic Condition Report, December, 1964. (This report states that it, together with the Staff Report on the Planning Considerations, constitutes the basis upon which the Planning Commission may act in certifying the area for redevelopment and renewal.)

(c) Federal-Anderson Survey and Planning Application by URA, November, 1965.

(19) The following documents were prepared by or for the Planning Commission and URA as part of the Commission's precertification studies:

(a) Ken Kauffman Memorandum listing North Shore businesses by street name. Mr. Kauffman was an assistant planner at URA in charge of making such studies. (2/71).

(b) Kauffman Memorandum listing major employers on the North Shore (2/71).

(c) Kauffman Memorandum re existing conditions of buildings in North Shore area. (2/71).

(d) Kauffman Memorandum re rezoning and special exception requests and occupancy permits. (2/71).

(e) North Shore Project-Water Supply and Facility Study by Mackin Engineering Company. (Undated).

(f) Soils report by Mackin Engineering Company. (1971)

(g) North Shore study, Architectural Analysis by James D. Van Trump and Arthur P. Ziegler. (5/71).

(h) Street Sufficiency Study by Mackin Engineering. (6/71).

(i) "An Historical Study of North Shore Urban Renewal Area", prepared by the Pittsburgh History and Landmarks Foundation. (6/30/71).

(j) "Land Use Marketability—North Shore Project" by October (the name of the consulting company which did the study of Washington, D.C.) (September, 1971).

(k) North Shore Basic Conditions Report, July, 1971, by Department of City Planning and Urban Redevelopment Authority of Pittsburgh.

(l) North Shore Proposal prepared by Planning Department and URA. (March, 1972).

(m) North Shore Basic Conditions Report as submitted to Planning Commission. (September, 1971).

(20) Subsequent to approval of the Redevelopment Proposal by City Council on May 5, 1972, the URA engaged in various redevelopment activities including the following:

(a) Filed an application for the year 1972-1973 to the Federal Neighborhood Development Program, which application was approved. (See Britz Deposition, Volume 12, pp. 60-61)

(b) Filed Neighborhood Development Program application for Federal funds for the year 1973-1974, which application was approved. (See Britz Deposition, Volume 12, p. 61)

(c) Filed Modification No. 1, dated December 1974, to the North Shore Plan. Pursuant to such Modification, URA acquired the B & O Stores, a building located on the north shore of the Allegheny River. (See Britz Deposition, Volume 12, p. 62)

(d) Filed North Shore Planning Application to the Community Economic Development Program, administered by the Pennsylvania Department of Community affairs, in May 1977. The application was granted and the proceeds were utilized by URA to fund a planning study known as the Wallace, McHorg, Roberts and Todd North Shore Study.

(e) Filed an application to the Department of Community Affairs for the acquisition of properties. The application was granted in the second quarter of 1979. (See Britz Deposition, Volume 12, p. 64)

(f) Condemned 28 properties pursuant to the Redevelopment Proposal approved by City Council on May 5, 1972. (See Britz Deposition, Volume 12, p. 81)

(g) Demolished 14 structures pursuant to the Redevelopment Proposal approved by City Council on May 5, 1972.

(21) The North Shore Proposal prepared by the Planning Department and URA (approved May, 1972) set forth the major plan to be used in the redevelopment activities in the 22nd and 23rd Wards of the City of Pittsburgh.

(22) The North Shore Proposal enunciates the following schedules, guidelines and principles to be used in the redevelopment process and plan:

(a) Exhibit 6, North Shore Schedule of Properties to be acquired (June 1, 1972 to May 31, 1973). This list of 27 properties includes locations on West and East General Robinson Street, Federal Street, Sandusky Street and Anderson Street exclusively.

(b) Exhibits 3-10, which include motions, resolutions and ordinances showing in detail the proposed method of redevelopment and public safeguards to be imposed on the entire project area. (1972 Proposal 2)

(c) Acquisition of properties will be limited to that required to remove pockets of blight, to create sites for new housing, commercial and necessary neighborhood facilities, and to remove certain structures that are so badly deteriorated that rehabilitation is not feasible. (1972 Proposal 3)

(d) Relocation activities will commence simultaneously with acquisition activities so that execution of the Plan can proceed as expeditiously as possible. (1972 Proposal 5)

(e) A maximum of nineteen structures on seventeen parcels is slated for demolition during the 1972-1973 period. (1972 Proposal 6)

(f) Rehabilitation is a significant part of the proposed redevelopment and the vast number of properties not to be cleared will undergo rehabilitation treatment for continued use or for change of use. (1972 Proposal 6)

(g) For the most part, rehabilitation will be carried out as a program of private action. (1972 Proposal 6)

(h) Rehabilitation technical assistance will be provided by the Authority to Project Area residents and businessmen. (1972 Proposal 8)

(i) Property owners will be given reasonable time in which to rehabilitate their properties as outlined in the Plan. (1972 Proposal 8)

(j) All the regulations, controls and restrictions with respect to the rise of the land in the Project area, set forth in the Plan, shall be effective for a period of forty (40) years from the effective date of the City Council approval of the Plan. (1972 Proposal 9)

(k) If the owners of properties designated for rehabilitation are unable or unwilling to comply or conform to the rehabilitation standards set forth in the Redevelopment Area Plan—Urban Renewal Plan within twelve (12) months from the date of written notice of the required improvements by the LPA, the LPA upon a determination by resolution, after due consideration that the property owner has failed to achieve substantial conformity with the PRS, may acquire such property by negotiation, or pursuant to the Eminent Domain Law of this State as if the property had originally been planned for acquisition after ninety (90) days written notice to the owner. (1972 Redevelopment Area Plan 15)

(l) Property will be acquired and cleared to: remove substandard conditions, remove blighting influences; provide land for public improvements or facilitie to promote historic or architectural preservation; to provide developable parcels for

redevelopment. (1972 Redevelopment Area Plan 46-47).

(m) Diligent efforts will be made by the Authority through negotiations with the owners of properties not be acquired to voluntarily comply with the standards and controls of the plan. (1972 Redevelopment Area Plan 49)

(23) Emil F. Kehr and Vincent E. Malone purchased the subject property, including three building, in June, 1977, for approximately $110,000.

(24) Although a title examination was made, there was no indication in the title examination that the property was in an area certified as blighted, or subject to pending condemnation proceedings.

(25) In March, 1980, E-V Company sold the 4-story building on its property.

(26) In February, 1981, E-V Company sold the two-story building on its property.

(27) At the time of these sales, E-V Company had no notice of pending condemnation proceedings.

(28) Since acquiring the property in 1977, E-V Company has made substantial improvements to it.

(29) Pittsburgh Harley Davidson purchased property on Isabella Street in 1950, 1951 and 1972.

(30) In 1975 Pittsburgh Harley Davidson (Pgh. H-D) applied for permission to build to its property line, and in 1976 Pgh. H-D erected an addtion to its building.

(31) Pgh. H-D also performed other substantial remodeling and repair work of its property costing in excess of $100,000 in the period subsequent to 1975.

(32) During the period subsequent to 1972, significant neighborhood changes, including building rehabilitation and business development, has occurred in the North Shore Area, including the vicinity on and around Isabella Street, location of the subject property.

(33) These changes, improvements and rehabilitations include the following:

(a) The rehabilitation of the former General Rubber Building by Limbach Company, which is adjacent to the subject property.

(b) The erection of the Mellon-Stuart building on Isabella Street.

(c) The remodeling of the Alling-Cory building.

(d) The relocation of the General Paper Store on Federal Street.

(e) The remodeling of George L. Wilson Company on General Robinson Street.

(f) The remodeling of the Volkwein Building at 117 Sandusky Street, one side of which is adjacent to the E-V Company property.

(34) The property of E-V Company was not listed on Exhibit 6 of the North Shore Proposal of March, 1972, as properties to be acquired in the years 1972-73, nor were they listed for acquisition in future years.

(35) The Declaration of Taking filed in October, 1981, was predicated on the North Shore Proposal and Redevelopment Plan of March, 1972.

(36) No contact was ever made with the owners of E-V Company concerning rehabilitation of their property to meet specified building standards of the North Shore Proposal and Redevelopment Plan.

CONCLUSIONS OF LAW

1. The Urban Redevelopment Authority has the authority to condemn buildings within an area certified as blighted pursuant to an approved plan for the redevelopment of an area. (Act of May 24, 1945, P.L. 991, Section 3, 35 P.S. §1703(m).

2. The power of discretion over what areas are to be considered blighted is solely within the power of the Urban Redevelopment Authority. (*Crawford v. Redev. Auth.* 418 Pa. 549, 554, 211 A. 2d 866, 868 (1965).

3. The scope of review of a certification of blight is limited to the questions of whether the Authority has acted arbitrarily; in bad faith; in violation of statutory procedures, or in violation of statutory procedures, or in violation of the constitution. (*In Re: City of Harrisburg*, 373 A. 2d 774, 776, citing *Crawford v. Redevelopment Authority*, 211 A. 2d 866, 868).

4. The fact that the E-V Company building is itself structurally sound is not in itself sufficient to prevent its condemnation when it is located in an area properly determined to be blighted. (*In re: City of Harrisburg*, 373 A. 2d 776).

5. A public authority may not condemn lands for a private purpose. *In re: Franklin Town Project*, 339 A. 2d 885 (Pa. Cmwlth 1975).

6. A taking does not lose its public character merely because some aspect of private gain attaches to the taking. *Belovsky v. Redevelopment Authority of Philadelphia*, 357 Pa. 329, 54 A. 2d 277 (1954).

7. While private property cannot be taken by eminent domain for the sole purpose of devoting it to the private use of another, if it is taken for a proper public purpose, it may be permitted to revert to private ownership when the public purpose is discharged. *Moyer Eminent Domain Appeal*, 22 Pa. Cmwlth. 487, 349 A. 2d 781 (1976).

8. Because the Urban Redevelopment Act and the powers granted thereunder are in derogation of the common law and confer the power of eminent domain, a strict construction of that law is required.

9. The Urban Redevelopment Authority is a public body which stands in a fiduciary relationship to the public and to taxpayers, and its conduct must always be guided by the rule of good faith, fidelity and integrity. *Schwartz v. Urban Redevelopment Authority*, 411 Pa. 530, 192 A. 2d 371 (1963).

10. The Urban Redevelopment Act provides for acquisition, clearance, and disposition of portions of blighted areas, on rehabilitation or conservation in such manner that blight or its manifestations may be eliminated or remedied. 35 P.S. §1702 (c.1).

11. The reason underlying the condemnation of the Isabella Street property was to effect the public purpose of carrying out the approved North Shore Plan and Proposal for the redevelopment of that area, which had previously been certified as blight by the City of Pittsburgh Planning Commission.

12. The requirements of eminent domain render the Constitution of Pennsylvania, Article I, Section 10, are that property must be taken for a public purpose, by authority of law, and with just compensation. *Faranda Appeal*, 420 Pa. 295, 299 (1966).

13. There is no specific order of activity in the condemnation of property, if the purpose of the taking accords with the constitutional and statutory requirements. *Faranda Appeal*, 420 Pa. 299.

14. It is presumed that the Planning Commission and Redevelopment Authority performed its duties in good faith, and the burden of proving fraud or abuse of discretion is a heavy one. *Simco Stores et al v. Redevelopment Authority*, 455 Pa. 438, 442 (1974), citing *Washington Park, Inc., Appeal*, 425 Pa. 349, 229 A. 2d 1 (1967). *See also Matter of Condemnation by Urban Redevelopment Authority of Pittsburgh*, 499 A. 2d 1146 (Pa. Commonwealth 1985).

15. The fact that E-V Company's property itself may be free from blight does not make the action of the Redevelopment Authority arbitrary. *See Condemnation of Blocks No. 197 et al., in Shamokin, Pennsylvania*, 41 Northumberland Law Journal 100 (1969).

16. It is not required that a redevelopment authority offer self-rehabilitation in every case. *Nixon Hotel, Inc., v. Redevelopment Authority of Butler*, 315 A. 2d 366, 11 Pa. Cmwlth. 519 (1974) cert. denied 95 S. Ct. 74, 419 U. S. 842, 42 L. Ed. 2d 70.

DISCUSSION

The North Shore and North Side redevelopment and renewal has been an ongoing part of the Pittsburgh Renaissance. The E-V Company property is situated in the midst of that redevelopment area and has been confronted with a condemnation proceeding against it. Our evaluation of this struggle of a small business to maintain its property cannot be premised on our own emotional reaction to the situation, but rather on the law. It bothers this court that other businesses and landowners in the close vicinity of E-V Company were given an option of rehabilitating their property, whereas E-V was not given that opportunity. For example, the former General Rubber Building is adjacent to E-V's property. Limbach Company privately rehabilitated that building, which, although larger and more ornate, still possess some structural similarities to the E-V Company Building. The Volkwein Company privately remodeled much of its building, one side of which is adjacent to E-V's property. The Alling-Cory building, which is in E-V's general vicinity, also underwent restoration by its private owner. Mellon-Stuart has erected its own building on Isabella Street and, according to plans, will be building on the E-V site after the consummation of the condemnation proceedings. The North Shore Proposal of 1972 specifically declares that "rehabilitation is a significant part of the proposed redevelopment", and "for the most part, rehabilitation will be carried out as a program of private action." *See* Finding 22(f) and (g).

Moreover, the proposal states that property owners will not only be allowed reasonable time in which to rehabilitate, but that technical assistance may also be provided in order to effect rehabilitation. Finding 22(i) and (h).

Although there is clear appearance of inequality of treatment, the evidence is not so clear and convincing of fraud, arbitrariness or bad faith. If left to our own discretion, we would sustain condemnees' preliminary objections, but under the standard enunciated by the Commonwealth Court, we cannot substitute our discretion for that of the Authority.

In *Matter of Condemnation by Urban Redevelopment Authority of Pittsburgh*, the Court reiterated that absent proof that the certification of blight was "arbitrary, capricious, made in bad faith, or the product of an abuse of discretion", that the trial judge may not substitute his discretion for that of a competent agency on the subject of blight. 499 A. 2d 1146 (Pa. Cmwlth. 1985).

The Redevelopment Authority has presented evidence that this certification was based on the research and planning of many competent people. We have reviewed the Commission's Plan and Proposal as well as other evidence. We cannot discern any arbitrary or capricious conduct here.

Moreover, the time span for the redevelopment project was set at forty (40) years. Abandonment or staleness cannot be shown here, as the plan will be in effect through 2012.

The case law governing takings for urban renewal gives broad power to the condemning authority. We cannot find any case law which substantiates the Condemnees' Preliminary Objections based on the instant facts. Based on the foregoing Finds of Fact and Conclusions of Law, we must deny the Condemnees' Preliminary Objections.

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

IN THE MATTER OF:
CONDEMNATION BY THE URBAN REDEVELOPMENT AUTHORITY OF PITTSBURGH OF CERTAIN LAND IN THE TWENTY-SECOND AND TWENTY-THIRD WARDS OF THE CITY OF PITTSBURGH, ALLEGHENY COUNTY, PENNSYLVANIA REDEVELOPMENT AREA NO. 39 (NORTH SHORE), BEING PROPERTY OF:

E-V COMPANY, a partnership composed of Emil F. Kehr and Vincent E. Malone, or any other persons found to have an interest in the property,

KELLER OFFICE EQUIPMENT COMPANY,

PITTSBURGH HARLEY DAVIDSON, INC., formerly Allegheny County Distributors, Inc., a Pennsylvania Corporation, or any other person found to have an interest in the property.

CIVIL DIVISION

NO. G.D. 81-27642

ORDER

AND NOW, this 21st day of February, 1986, based on the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED, ADJUDGED and DECREED that the Condemnees' Preliminary Objections are DENIED.

BY THE COURT

/s/ LOUIK ..... , J.
Maurice Louik

PRELIMINARY OBJECTIONS TO DECLARATION OF TAKING

E-V Company, a partnership composed of Emil F. Kehr and Vincent E. Malone, hereinafter called "Owner," preliminarily objects to the Declaration of Taking filed in this case and denies the power and the right of Urban Redevelopment Authority of Pittsburgh, hereafter called the "Authority," to appropriate the real property of the Owner described in the Declaration of Taking, hereafter called the "property," the sufficiency of the security, the propriety of the procedure followed by the Authority and the validity of the Declaration of Taking for the following reasons as thus far known to the Owner:

1. According to the Notice to Condemnee of Condemnation served upon Owner the Declaration of Taking was filed in this case on October 9, 1981.

2. The Declaration of Taking recites that the condemnation of the property of the Owner was approved by a resolution of the board of the Authority adopted on September 17, 1981.

3. Resolution No. 253 (1981), attached as Exhibit "A" to the Declaration of Taking, indicates that the power of eminent domain is exercised for the public purpose of carrying into effect a proposal for the redevelopment of Redevelopment Area No. 39, North Shore, which was approved by the Council of the City of Pittsburgh on May 5, 1972, almost nine and one half years prior to the filing of the Declaration of Taking.

4. The date of the certification of blight required by the Urban Redevelopment Law is unknown to the Owner but it obviously occurred prior to the action of the Council

of the City of Pittsburgh on May 5, 1972 and presumably was many months prior to that time.

5. No notice of the certification of blight by the City of Pittsburgh Planning Commission, hereafter called the "Commission," was recorded in the Office of the Recorder of Deeds where it would have been discovered by the Owner which acquired the property in 1977, following the obtaining of a title examination, which acquisition was subsequent to the certification of blight.

6. The area certified by the Commission as a blighted area and a redevelopment area was not, in fact, blighted at the time of certification nor was the property of the Owner or of any property geographically proximate to the property of the Owner or which comprised the same business community or neighborhood according to street patterns and land uses as the property of the Owner blighted at such time. Rather, the area was productive, attractive and important to the social business life of the community.

7. The area certified by the Commission as a blighted area and a redevelopment area was not, in fact, blighted nor was any part of it which is geographically proximate to the property of the Owner or which comprises the same business community or neighborhood according to street patterns and land uses as the property of the Owner blighted as of the date of the filing of the Declaration of Taking nor within a reasonable time prior thereto. Rather, the area is productive, attractive and important to the social and business life of the community.

8. Extensive rebuilding, remodeling, demolition of structures and changed land uses in the area of the property of the Owner and in the area certified as blighted has

taken place within the last nine years substantially altering and improving the character of the area.

9. The Pennsylvania Local Agency Law was enacted on December 2, 1968, effective January 1, 1969.

10. The identity of the owner of the property of the Owner and its address and the identity and address of its predecessor in title are and have been easily ascertainable from public records in the County of Allegheny and the City of Pittsburgh.

11. No notice of the certification of blight proceeding was given to the Owner or to its predecessor in title as required by due process of law and the Local Agency Law.

12. No opportunity was afforded to the Owner or its predecessor in title to be present at the certification of blight proceeding and to be heard and to state objections, notwithstanding that a certification of an area as a blighted area and a redevelopment area has a chilling and adverse affect on property ownership and use and the operation of businesses within a neighborhood certified as blighted and as a redevelopment area and notwithstanding that the following specific adverse effects follow a certification of blight and of an area as a redevelopment area in a neighborhood:

a. Real property and fixtures are no longer saleable on a free and open market

b. Real property can no longer be mortgaged or otherwise used as security for loans to finance improvements to property or as capital for business ventures

c. Business and residential tenants occupying properties within the certified area terminate or do not renew their leases and leave the area thus causing vacancies

d. Buildings within the area become unoccupied

e. Structures are boarded up

f. Structures are demolished

g. Vandalism rapidly takes place within the certified area and plumbing and hardware are stripped from buildings

h. Normal maintenance of buildings including painting diminishes or ceases

i. Trash collects

j. Deterioration of structures and of the neighborhood itself sets in rapidly

k. Normal growth and expansion of existing businesses and non-profit enterprises ceases and even the conduct of businesses and non-profit enterprises diminishes or ceases

l. Property values decrease

m. Customers and business visitors cease to come to the neighborhood and deal in the merchantile establishments and establish business relationships elsewhere

n. Some property owners settle with the prospective condemnor and convey their properties under the threat of condemnation and in lieu of condemnation

o. Owners and tenants are at the mercy of the prospective condemnor as to when their properties or businesses will be taken under its power of eminent domain.

13. The Urban Redevelopment Law violates both the federal and state constitutions, at least in the circumstances of this case, because its definition of the term blight and the criteria expressed in the statute for the determination of blight are so vague that men of common intelligence must necessarily guess at the meaning intended and differ as to the application of the statutory language, thus violating the essentials of due process of law.

14. The purported taking of the property of the Owner is void and of no effect because the Urban Redevelopment Law violates the federal and state constitutions in not providing for, or requiring, any type of meaningful notice to, or any type of hearing of, the objections of property owners and tenants and owners and operators of businesses within an area being considered by a planning commission for certification as blighted and as a redevelopment area prior to the planning commission voting to certify or not.

15. No statute of Pennsylvania provides for, or requires, any type of notice to, or any type of hearing of, objections of property owners and tenants and owners and operators of businesses within an area being considered by a planning commission for certification as blighted and as a redevelopment area prior to the planning commission voting to certify or not, all in deprivation of the rights of the owner and of other similarly situated to due process of law.

16. The Commission is a local agency within the meaning of the Pennsylvania Local Agency Law and the certification of an area as blighted and as a redevelopment area is an adjudication within the meaning of the Local Agency Law.

17. Neither the Commission nor anyone else gave meaningful notice to the Owner or to its predecessor in title of the adjudication proceeding involving the certification of the area including the property of the Owner as a blighted area and a redevelopment area or designated the Owner or its predecessor in title or others similarly situated as a party in the certification of blight proceeding or afforded the Owner or its predecessor in title or others similarly situated the rights of a party in that proceeding, including the right to be heard.

18. No record of the proceedings before the Commission at which it certified the area as a blighted area and a redevelopment area was made within the meaning and requirements of the Local Agency Law.

19. No reasons for the adjudication determining that the area was a blighted area and a redevelopment area were made and filed by the Commission.

20. No right to appeal as guaranteed by the Constitution of Pennsylvania was preserved for the Owner or its predecessor in title by the actions of the Commission.

21. No notice or opportunity to be present and to be heard and object was given to the Owner or its predecessor in title of the Commission meeting or the Authority meeting where the Redevelopment Proposal and Redevelopment Area Plan were approved or of the City Council meeting approving the Redevelopment Proposal even

though the identities and addresses of the Owner and its predecessor in title and of others similarly situated were easily ascertainable from the public records in Allegheny County and the City of Pittsburgh.

22. The City of Pittsburgh Council proceedings approving the Redevelopment Proposal were not due process hearing or administrative or quasi-judicial hearings within the meaning of the federal and state constitutions or of any state law because there was no full and complete record of the proceedings kept, there was no right to examine or cross-examine witnesses, nor to produce witnesses nor to introduce evidence and no personal notice was given to the Owner or its predecessor in title or others similarly situated of the right to be present and to be heard.

23. No pre-determination or pre-deprivation hearing has been held or provided with respect either to the certification of blight proceeding or the passage of title as of the time of the filing of the Declaration of Taking from the Owner to the Authority, all to the harm of the Owner, particularly when coupled with the previously stated policy of the law that a heavy burden is placed upon one who objects to the validitly of a taking to establish that the taking was in palpable bad faith, arbitrary and capricious or otherwise illegal.

24. The actions of the Authority and of the Commission have deprived the Owner and its predecessor in title of their right to effective judicial review of the governmental actions involved.

25. The purported taking of the property of the Owner is a denial of due process of law where it is premised upon

a certification of blight proceeding more than nine years old.

26. The studies, facts and data, if any, upon which the certification of blight proceeding, if any, were founded is stale on its face as a matter of law after the passage of more than nine years.

27. The proposed redevelopment of an area more than nine yaers after the certification of blight, if any, is selectively unfair and a denial of due process of law and the equal protection of law to the Owner.

28. Neither the Declaration of Taking nor the resolution incorporated as Exhibit "A" to it indicate that there was a certification of blight proceeding.

29. The purported taking of the property of the Owner is for the primary gain and benefit of a private entity rather than for a public purpose.

30. The result of the purported taking is to inordinately benefit a private entity or entities at the expense of the owner of the property being taken.

31. If the certification of blight determination and resolution by the Commission followed the language of the Urban Redevelopment Law, then it is impermissibly vague and lacking in the specificity necessary to establish the existence of conditions constituting such blight as would justify a certification of blight.

32. The purported taking is a wrongful use of the power of eminent domain conceived and wrought in bad faith and in an arbitrary and capricious manner for the purpose of benefiting another private entity or entities by the appropriation of the property of the Owner.

33. The Owner believes and, therefore, avers that an agreement or agreements, the substance of which are unknown to the Owner, has or have bee entered into by the Authority and another person or persons by which the Authority is to use its power of eminent domain for the private gain and benefit of the other party or parties to the agreement at the expense of the Owner of the property purported to be appropriated.

34. The Authority is acting as the agent of a private entity or entities to acquire for it or them the property of the Owner in violation of the constitution and laws of the United States and of Pennsylvania.

35. The filing of a Declaration of Taking in the Prothonotary's Office and of a plan and of a notice of condemnation in the office of Recorder of Deeds without a hearing on the certification of the area as a blighted area and a redevelopment area and without a hearing prior to the transfer of title to the Authority is in violation of the rights of the Owner guaranteed it by the constitutions and laws of the United States and of Pennsylvania.

36. The Owner believes and, therefore, avers that the members of the Commission involved in the certification of blight proceeding have not acted with the deliberate, objective and unbiased consideration and independent judgment and actions required of a public body in considering or undertaking the certification of blight procedure for this redevelopment project.

37. Neither the Commission nor any other person complied with the requirements of the Sunshine Act of Pennsylvania by giving meaningful notice to the Owner or its predecessor in title and others similarly situated which

would have afforded them an opportunity to appeal and be heard and object at the certification of blight proceedings, if any, before the Commission thereby invalidating the entire proceeding and this purported taking.

38. The Authority and the City of Pittsburgh have undertaken aids and benefits to an unknown private entity or entities scheduled to acquire from the Authority the property of the Owner in violation of due process of law and the equal protection of the law.

39. The purported taking of the property of the Owner is a taking for other than a public purpose and far in excess of the needs of the public and is beyond what the public need permits.

40. The purpose of the redevelopment project and of the condemnation is not for the replanning of a blighted area, but in order to acquire prime commercial land for development by others of the property of the Owner which property is being productively and effectively utilized.

41. The bond of the Authority, without surety, is insufficient security.

42. The Owner reserves the right to amend these preliminary objections insofar as is appropriate in connection with any information developed by discovery or at hearing.

WHEREFORE, the Owner requests that your Honorable Court declare the purported taking of the property of the Owner void and of no effect and that a revesting of title in the Owner be ordered.

/s/ THOMAS J. DEMPSEY

Thomas J. Dempsey
Attorney for Owner
820 Frick Building
Pittsburgh, PA 15219
(412) 281-2442

COMMONWALTH OF PENNSYLVANIA
COUNTY OF ALLEGHENY } SS:

Before me, the undersigned authority, personally appeared Vincent E. Malone, who, being duly sworn according to law, deposes and says that the facts contained in the foregoing preliminary objections, are true and correct to the best of his knowledge, information and belief.

/s/ VINCENT E. MALONE
Partner

SWORN TO and subscribed before me
this 13th day of November, 1981.

/s/ SHARON MOONEY
SHARON MOONEY
PITTSBURGH ALLEGHENY COUNTY
MY COMMISSION EXPIRES MAY 10, 1982
Member, Pennsylvania Association
of Notaries

PRELIMINARY OBJECTIONS TO DECLARATION OF TAKING

Keller Office Equipment Company preliminary objects to the Declaration of Taking filed in this case on October 9, 1981, served upon it on May 13, 1982 and allegedly "reinstated" on May 11, 1982 and denies the power and the right of Urban Redevelopment Authority of Pittsburgh, hereafter called the "Authority," to appropriate the property interests, hereafter called "property," of Keller Office Equipment Company, hereafter called "Keller," the sufficiency of the security, the propriety of the procedure followed by the Authority and the validity of the Declaration of Taking for the following reasons as thus far known to Keller:

1. Service was not made upon Keller of written notice of the filing of the Declaration of Taking within the time required by Section 405 of the Eminent Domain Code.

2. There is no procedure provided by the Eminent Domain Code which establishes the exclusive procedure governing condemnations or otherwise by applicable law for reinstatement of a declaration of taking.

3. The alleged reinstatement was without notice to Keller.

4. Keller incorporates by this reference, and adopts as its own as further preliminary objections by it, the content of paragraphs 1 through 41, inclusive, of the Preliminary Objections To Declaration of Taking filed by E-V Company at G.D. 81-27642 in the Court of Common Pleas of Allegheny County, Pennsylvania, changing, however, the references therein to "Owner" to "Keller."

5. Keller believes, and therefore avers, that Mellon-Stuart Company is the entity for which the Authority seeks to use its power of eminent domain for the inordinate and illegal private gain and benefit of Mellon-Stuart Company at the expense of Keller.

6. Keller reserves the right to amend these preliminary objections insofar as is appropriate in connection with any information developed by discovery or at hearing.

WHEREFORE, Keller requests that your Honorable Court declare the purported taking of its property interest void and of no effect.

/s/ THOMAS J. DEMPSEY

Thomas J. Dempsey
Attorney for Keller Office
Equipment Company
820 Frick Building
Pittsburgh, PA 15219
(412) 281-2442

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF ALLEGHENY } SS:

Before me, the undersigned authority, personally appeared Helen M. Bleil, who, being duly sworn according to law, deposes and says that the facts contained in the foregoing preliminary objections are true and correct to the best of her knowledge, information and belief.

/s/ HELEN M. BLEIL

SWORN TO and subscribed before me
this 15th day of June, 1982.

/s/ SHARON M. WILEY
SHARON M. WILEY, NOTARY PUBLIC
PITTSBURGH, ALLEGHENY COUNTY
MY COMMISSION EXPIRES MAY 10, 1982
Member, Pennsylvania Association
of Notaries

[REQUEST FOR]
CONCLUSIONS OF LAW

1. The purported takings of the property of E-V Company and of the property interest of Keller Office Equipment Company are void as being arbitrary, capricious and in bad faith.

2. The condemnor failed to meet its burden of proof to show that the area in which the E-V Company property was located was a blighted area either in 1964 or 1971 or in 1981.

3. Neither the 1964 certification of blight nor the 1971 certification of blight may legally and constitutionally support the 1981 condemnation which is, therefore, void.

4. There has been an utter lack of due process of law for failure to give adequate notice of the certification of blight proceedings at meaningful times and of adequate notice of the presentation and consideration of Modification No. 2 to the Planning Commission and to City Council.

5. The condemnees and their predecessors in title have been denied an opportunity to be heard on the question of whether the area in which the subject property was located was a blighted area within the meaning of the Urban Redevelopment Law.

6. The condemnees and their predecessors in title have been denied an opportunity to examine the persons themselves, if any, who actually made physical inspections of the exterior and interiors of the properties located in the project area.

7. As the 1964 Basic Conditions Report was considered outdated and a new one prepared in 1971 so the 1971 Basic Conditions Report was outdated and a new one should have been prepared in 1980 or 1981.

8. No opportunity has been constitutionally afforded to the condemnees to challenge the validity of the taking of their property and property interests.

9. The proceedings of the Planning Commission in 1964 and in 1971 and in 1981 failed to comport with minimal due process of law requirements.

10. The Authority is estopped from proceeding with the North Shore project and the appropriation of the E-V Company property.

11. The Authority abandoned the North Shore project by official action.

12. The Authority abandoned the North Shore project by its absolute neglect of private real estate transactions taking place within the project area over a long period of time.

13. Changes of such a substantial nature occured in the project area between 1964 and 1971 and between 1971 and 1981 that a new certification of blight proceeding was required prior to the condemnation in 1981.

14. There is no provision in Pennsylvania law for a "re-certification" of blight or for a modification of a redevelopment plan.

15. The condemnees have been deprived of their constitutional rights by a shifting of the burden of proof by reason of the conduct of the Authority.

16. A certification of blight determination is an adjudication within the meaning of the Local Agency Law.

17. A certification of blight substantially and adversely affects property rights.

18. The certification of blight and recertification of blight in 1971 is void for failure to comply with the requirements of the Local Agency Law and for failure to afford due process of law and the purported condemnation is, therefore, void.

19. The proceedings of the Planning Commission and of the Authority have violated the provisions of the Sunshine Act and have deprived the condemnees of their property without due process of law.

20. Unless read in context with the Local Agency Law and unless the procedures there set forth are used, the Urban Redevelopment Law is unconstitutional as denying under the circumstance of this case an opportunity to a property owner or the owner of a property interest to challenge the validity of the taking of his property or property interest at a meaningful time in a meaningful fashion.

21. The Authority has impermissiby deprived the condemnees of their rights to rehabilitate the E-V Company building.

22. The rehabilitation policies of the Authority with respect to the E-V Company building have been selectively discriminatory and the condemnation is, therefore, void.

23. The Authority has impermissibly ignored the fact that E-V Company has rehabilitated its property itself and the Authority has wrongfully failed even to investigate the physical and economic condition of the E-V Company

structure and, within a reasonable time before the purported condemnation, the physical and environmental conditions of the other structures in the area.

24. Just compensation for the taking of property is never a full substitute for the ownership of property itself and will not be tolerated in a democracy unless the public necessity absolutely demands the appropriation.

25. There is no public necessity for the taking of the property of E-V Company.

26. There is no justification for the proposed public use of the E-V Company property or of the interest of Keller Office Equipment Company which would justify a taking by eminent domain.

27. The Authority has grossly abused its discretion in purporting to appropriate the E-V Company building and land.

28. The Urban Redevelopment Law in this instance has been grossly misused by the Authority.

29. The certifications of blight are stale as a matter of law.

30. The purported certifications of blight are void for failure to specifically detail conditions considered to have justified the certifications.

31. The vagueness of generality of the certifications of blight have precluded effective appellate review of the propriety of the certifications.

32. Service of the declaration of taking on Keller Office Equipment Company was void because not served within 30 days of the filing of the declaration of taking.

33. There is no procedure authorizing a reinstatement of a declaration of taking and the attempted reinstatement prior to service upon Keller Office Equipment Company was void particularly in light of the time period involved.

34. The Authority could not legally amend its declaration of taking.

35. The condemnes had a right to amend their preliminary objections.

36. A purported condemnation is an impermissible attempt to transfer private property from one private property owner to another selected by the Authority.

37. The Authority and the Planning Commission could easily have ascertained the ownership of the E-V Company property in 1964 and in 1971 and in 1980 or 1981 and served adequate notice upon that person by constitutional means of the certification of blight proceedings and of the proceedings relating to Modification No. 2.

38. Neither the Planning Commission nor the Authority nor the Planning Department conducted constitutionally requisite certification of blight studies.

39. The purchaser of a property located in an area certified as blighted is not bound by a certification of blight of which he has not had personal notice or at least notice of record discoverable by a title examination.

/s/ THOMAS J. DEMPSEY

Thomas J. Dempsey
Attorney for Condemnees
820 Frick Building
Pittsburgh, PA 15219
(412) 281-2442

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Section 406 of the Pennsylvania Eminent Domain Code, Act of June 22, 1964, P.L. 84, 26 P.S. 1-406, relating to challenges to a condemnation provides:

> (a) Within thirty days after being served with notice of condemnation, the condemnee may file preliminary objections to the declaration of taking. The court upon cause shown may extend the time for filing preliminary objections. Preliminary objections shall be limited to and shall be the exclusive method of challenging (1) the power or right of the condemnor to appropriate the condemned property unless the same has been previously adjudicated; (2) the sufficiency of the security; (3) any other procedure followed by the condemnor; or (4) the declaration of taking. Failure to raise these matters by preliminary objections shall constitute a waiver thereof.
>
> (b) Preliminary objections shall state specifically the grounds relied upon.

(c) All preliminary objections shall be raised at one time and in one pleading. They may be inconsistent.

(d) The condemnee shall serve a copy of the preliminary objections on the condemnor within seventy-two hours after filing the same.

(e) The court shall determine promptly all preliminary objections and make such preliminary and final orders and decrees as justice shall require, including the revesting of title. If preliminary objections are finally sustained, which have the effect of finally terminating the condemnation, the condemnee shall be entitled to damages as if the condemnation had been revoked under section 408, to be assessed as therein provided. If an issue of fact is raised, the court shall take evidence by depositions or otherwise. The court may allow amendment or direct the filing of a more specific declaration of taking.

3. Section 402(a) of the Pennsylvania Eminent Domain Code, Act of June 22, 1964, P.L. 84, 26 P.S. 1-402(a), relating to the passage of title to a condemnor provides:

(a) Condemnation, under the power of condemnation given by law to a condemnor, which shall not be enlarged or diminished hereby, shall be effected only by the filing in court of a declaration of taking, with such security as may be required under Section 403(a), and thereupon the title which the condemnor acquires in the property condemned shall pass to the condemnor on the date of such filing, and the condemnor shall be entitled to possession as provided in section 407.

4. Section 9(i) of the Pennsylvania Urban Redevelopment Law, Act of May 24, 1945, P.L. 991, as amended, 36 P.S. 1709(i), granting the power to redevelopment authorities to acquire properties by eminent domain provides:

> (i) To acquire by eminent domain any real property, including improvements and fixtures for the public purposes set forth in this act, in the manner hereinafter provided, except real property located outside a redevelopment area.

5. Section 10(a) and (b) of the Pennsylvania Urban Redevelopment Law, Act of May 24, 1945, P.L. 991, as amended, 36 P.S. 1710(a) and (b), relating to the prerequisite of a certification of blight for the exercise of the power of eminent domain provides:

> (a) An Authority shall prepare a redevelopment proposal for all or part of any area certified by the planning commission to be a redevelopment area and for which the planning commission has made a redevelopment area plan.
>
> (b) The planning commission's certification of a redevelopment area shall be made in conformance with its comprehensive general plan (which may include, inter alia, a plan of major traffic arteries and terminals and a land use plan and projected population densities) for the territory under its jurisdiction or for any greater area for which the field of operation of the Authority has been extended under clause (e) of section 3 of this act.

6. Section 2(a) of the Pennsylvania Urban Redevelopment Law, Act of May 24, 1945, P.L. 991, as amended, 36 P.S. 1702(a), relating to the criteria as to which a planning

commission is to make its determination as to the existence of blight provides as follows:

> It is hereby determined and declared as a matter of legislative finding—
>
> (a) That there exist in urban communities in this Commonwealth areas which have become blighted because of the unsafe, unsanitary, inadequate or overcrowded condition of the dwellings therein, or because of inadequate planning of the area, or excessive land coverage by the buildings thereon, or the lack of proper light and air and open space, or because of the defective design and arrangement of the buildings thereon, or faulty street or lot layout, or economically or socially undesirable land uses.

7. Section 3(n) of the Pennsylvania Urban Redevelopment Law, Act of May 24, 1945, P.L. 991, as amended, 36 P.S. 1703(n), defines a "Redevelopment Area" as

> Any area, whether improved or unimproved, which a planning commission may find to be blighted because of the existence of the conditions enumerated in section two of this act so as to require redevelopment under the provisions of this act.

(3)

No. 91-625

In the Supreme Court of the United States

OCTOBER TERM, 1991

E-V Company, a Partnership Composed of Emil F. Kehr and Vincent E. Malone, and Keller Office Equipment Company,

Petitioners

v.

Urban Redevelopment Authority of Pittsburgh,

Respondent.

Brief in Opposition To Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

GEORGE R. SPECTER
Counsel of Record for Respondent
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STATEMENT OF THE CASE

Petitioners seek review of a decision of the Supreme Court of Pennsylvania which sustained an acquisition of property by condemnation by the Respondent, the Urban Redevelopment Authority of Pittsburgh ("URA").

In Pennsylvania, a condemnation is effected by virtue of a condemnor filing a Declaration of Taking in the Court of Common Pleas and serving same on the condemnee. 26 P.S. § 1-402(a) A condemnee desiring to challenge the taking may file Preliminary Objections thereto within thirty (30) days after being served. 26 P.S. § 1-406(a) Evidence relating to disputed questions of fact may be developed in a hearing before the Court or in depositions. 26 P.S. § 1-406(e) In the case at bar, the Court ordered the use of depositions. In addition, a condemnee may utilize all of the discovery processes and tools incident to general litigation such as depositions, interrogatories, request for production of documents, examination of an adversary's records and requests for admissions.

In Pennsylvania, a redevelopment project can be proposed if prior thereto the municipal Planning Commission has certified that a particular area has become blighted and is in need of redevelopment. Thereafter, a redevelopment authority may propose a redevelopment project pursuant to the Urban Redevelopment Law of Pennsylvania, 35 P.S. § 1701, et seq ("URL"), which proposal will include the acquisition of properties required to effectuate the redevelopment project. The proposal by the authority must be approved by the governing body of the municipality. In the case of the City of Pittsburgh, the governing body is the City Council.

On October 9, 1981, the Respondent filed a Declaration of Taking condemning the property of Petitioner. The Petitioners contend that the taking was unconstitutional because it occurred so long after the certification of blight on October 4, 1971 that it was not feasible to challenge effectively the certification; however, a cursory review of the evidence and the pretrial

and trial proceedings prove that contention to be totally without merit, and in no event can it rise to the level of a constitutional argument.

The Petitioners state that the persons who participated in the blight study process were not available for them to cross-examine and confront. This is simply not so. The URA produced for deposition Mr. William Waddell, who personally directed and carried out the blight study and made the recommendation of blight to the Planning Commission. The URA also produced Jan Krygowski, Planning Director of the URA during the certification study process and during the period of initial implementation of the Proposal. Mr. Krygowski was the person who personally supervised the URA's activities during such periods and personally identified the important exhibits evidencing such participation. The Condemnees did not seek discovery from a single, solitary person who was not made available to them. They took no steps whatsoever to determine whether any of the many persons who worked on the study process were available for deposition, answering of interrogatories or for appearance during the depositions for trial stage. Therefore, they are now estopped to assert any constitutional arguments. They really do not know whether any person familiar with the blight study process was truly unavailable.

The URL sets forth the procedures and steps to be followed in a redevelopment project. The last step is that City Council holds a public hearing on the proposal at which hearing any interested person or entity is entitled to be heard. Such hearing was held on April 12, 1972. City Council must approve or reject the proposal, which approval includes authorizing URA to effectuate required condemnations. It is most important that Petitioners do not allege that public notice of the hearing before City Council was not duly given.

Petitioners' property is located within 90.8 acres which were certified as blighted by the City Planning Commission on October 4, 1971. A point of information is in order regarding a certification by the Commission on December 18, 1964 of 203

acres which also contained Petitioners' property. The 1964 certification is irrelevant as the area certified as blighted in 1971 stands on its own and is the one at issue in this case.

SUMMARY OF THE ARGUMENT

This case involves a condemnation of Petitioners' property for redevelopment purposes, based upon a prior certification by the local Planning Commission that the area in which the property was located was blighted and in need of redevelopment. Pennsylvania condemnation procedure permits a condemnee to challenge the blight certification by filing Preliminary Objections to the taking at the time it occurs. Further, the Supreme Court of Pennsylvania held that a blight finding may be challenged in an action in equity upon approval of a redevelopment project by the City Council. The Pennsylvania process is not unique, and the decision of the Supreme Court of Pennsylvania is not in conflict with any decision of this Court, any decision of a State court of last resort or decision of any United States Court of Appeals. There is not at issue here any question of great public importance. Rather, there is at best only questions traditionally and appropriately left to State legislatures.

Petitioners' contention that an excessive amount of time elapsed between the time of the certification of blight and the taking of their property is not correct. There is not a constitutional issue present herein. Petitioners had eleven months in which to conduct pretrial discovery and six months in which to conduct depositions for trial. Despite the availability of such time periods, Petitioners have not set forth the name of any person they wished to depose or from whom they otherwise wished to obtain evidence. Accordingly, they should not now be heard to complain, especially on constitutional grounds, when no evidence of lack of necessary witnesses exists.

Petitioners' contention, that the time span involved prejudiced them to the extent of a constitutional infringement, is not warranted as a general proposition of law. The time period involved here is approximately ten years. Many causes of action in Pennsylvania are governed by statues of limitations

which could result in trials ten or more years after the event at issue. Such time period does not deprive a party of the constitutional right to a fair trial.

A certification of blight is not a taking of a person's property, but rather is a legislative finding that certain conditions exist in an area. Such finding may never be acted upon and no property may ever be taken; therefore, constitutionally, a property owner within the area is not entitled to a trial based upon such certification alone.

ARGUMENT IN OPPOSITION TO GRANT OF WRIT OF CERTIORARI

I. This case does not involve any question of exceptional public importance.

Certiorari should be granted only in cases involving principles, settlements of which are of importance to the public as distinguished from the parties, and in cases where there is a real conflict of opinion and authority between Courts of Appeals. *National Labor Relations Board v. Pittsburgh S.S. Co.*, 340 U.S. 498, 71 S.Ct. 453, 95 L.Ed. 479 (1951).

Rule 10.1, Rules of this Court, relating to "Considerations Governing Review on Writ of Certiorari" provide that certiorari "will be granted only when there are special and important reasons therefor". In *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955), this Court said on page 616 (S.Ct.) as follows:

> "Special and important reasons imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance become evasion."

The Petitioners do not assert, as indeed they cannot, that the decision of the Supreme Court of Pennsylvania is in conflict with any decision of this Court, any decision of a State Court of last resort or a decision of any United States Court of Appeals. Petitioners do not assert that the process in Pennsylvania for

effectuation of redevelopment projects is unique. There are not present here the "special and important reasons" referred to in *Rice, supra.* There are, at best, only arguments as to whether there might be some better way to implement a redevelopment project. Such decisions should be and traditionally have been left to state legislatures.

II. Petitioners were afforded a meaningful hearing at a meaningful time and had available to them all witnesses, documents and evidence necessary for a full, fair and complete hearing.

The Petitioners had a period of eleven months in which to conduct pretrial discovery. They took one deposition and filed a Request for Production of Documents to review documents on file at the offices of URA. All files were made available to Petitioners' attorney. All of the sixteen (16) studies relating to the blight certification process were in such files and available for inspection. Therefore, Petitioners had the opportunity and time (11 months) in which to take the deposition of any person who prepared any such information or who participated at all in any aspect of the certification of blight process. They could have engaged in other forms of discovery such as interrogatories or request for production of documents relative to such information. Petitioners adduced no evidence of any nature whatsoever which would indicate that any person they wished to depose or otherwise obtain evidence from was unavailable or unwilling to provide such evidence. The depositions for trial were taken from September, 1982 to February, 1983, a period of 6 months. Petitioners could have called as witnesses numerous persons who participated in the blight studies. They did not do so and should not now be heard to complain, particularly on constitutional grounds, of a lack of available witnesses when, in fact, no evidence of such nonavailability exists.

Chief Judge Crumlish, writing for a unanimous Commonwealth Court below, summarized cogently the inadequacy of and lack of merit in Petitioners' assertions:

> "They had eleven months subsequent to the declaration of taking to obtain discovery but sought only to review the

Authority's files and to take the deposition of the Authority's engineering consultant, Kenneth Ira Britz. The Condemnees' bare assertions, without substantiation, that critical witnesses are unavailable or unable to competently testify about the 1971 certification are insufficient for us to conclude that there was an unconstitutional violation of due process.

The Condemnees' argument is further weakened by the fact that the Authority produced, and the Condemnees cross-examined, at least two witnesses who were intimately involved with the certification activities and decision-making process."

Judge Crumlish concluded as follows:

"Following our thorough review of the record testimony and evidence, we can discern no indication that the mere lapse of time has so disabled the Condemnees in proving their allegations as to rise to the level of a constitution violation."

(App. A-49)

It is obvious that Petitioners consciously chose not to attempt to determine the names of or call those persons actually involved in the certification process. The record is devoid of evidence that any such persons were not available.

The attempt by Petitioners, without offering any evidence in support thereof, to raise the time span argument into a constitutional issue is not warranted as a general proposition of law. There are many instances in which litigation is properly commenced many years after the event which is the subject thereof. By way of example, many causes of action in Pennsylvania are covered by a six year statute of limitations. 42 Pa.C.S.A. § 5527. Such period is not substantially different from the time span of which Petitioners here complain. It would not be unusual for a case commenced six years after the subject event to be tried nine, ten or more years after the occurrence. In such cases, it is possible that witnesses might move away, die or otherwise not be available. That does not render a six year

statute of limitations unconstitutional. Here, there is no evidence that all relevant witnesses were not available to testify.

Whatever may be the merits of a time span argument, they are not relevant here because Petitioners have not set forth the name of a single person whom they attempted to obtain as a witness who was not available.

Therefore, there can be no conclusion but that the alleged substantial constitutional issues advanced by Condemnees are merely a smokescreen utilized to hide the actual facts of this case: the actual facts being the overwhelming weight of the blight studies, data gathering process and good faith efforts of individuals such as William Waddell and Jan Krygowski which resulted in a meaningful and valid certification of the project area as blighted.

Petitioners' assertion that the URA abandoned the project is not supported by the record and is contrary to the findings of fact of the trial judge. Redevelopment of the area was a continuing process which commenced in 1971 and continued unabated through and past the date of condemnation on October 9, 1981.

Subsequent to City Council approval of the Redevelopment Proposal on March 5, 1972 the URA acted promptly to carry out the Proposal. There was a constant stream of redevelopment activities from such date through and past October 9, 1981, the date of condemnation. As the testimony indicates, such activities never abated, but moved forward constantly through the years.

On the above point, Judge Louik in his trial court Adjudication below said that "moreover the time span for the redevelopment project was set at forty (40) years. Abandonment or staleness cannot be shown here, as the plan will be in effect through 2012". (App. A-71) Judge Louik also found as facts the many redevelopment activities engaged in by the URA subsequent to approval of the Redevelopment Proposal by City Council. (App. A-61-62)

The cases cited by Petitioners in support of their "meaningful time" argument are simply not relevant here. *Armstrong v.*

Manzo, 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965) involved a failure to give notice to a natural father that his wife's second husband had petitioned to adopt the father's daughter. It was in *Armstrong* that this Court used the term "meaningful hearing at a meaningful time" upon which Petitioners rely herein. The right of a parent to continue his/her parental rights is so fundamental as to require no further discussion.

The other cases cited by Petitioners relate to basic property rights, i.e., suspension of driver's license, garnishment, wrongful termination, a prior determination without a hearing that a person could not purchase liquor, so that each case involves an immediate deprivation of rights then vested and existent in specific individuals. The above deprivations contrast sharply with the facts and law in the case at bar.

A certification of blight is not a deprivation of the property right of an individual or even a group of individuals. Rather, it is in the nature of a legislative finding that certain conditions exist in an area. *Trager v. Peabody Redevelopment Authority,* 367 F.Supp. 1000 (1973); see also *Government of the Virgin Islands v. 19.623 Acres of Land,* 536 F.2d 566 (1966) and *Joiner v. City of Dallas,* 419 U.S. 1042, 95 S.Ct. 614, 42 L.Ed.2d 637 (1974), aff'g. mem. 380 F.Supp. 754 (N.D.Tex., 1974). Simply put, that is the extent of a certification. A certification does not require that any action be taken, and an area may be certified as blighted and nothing ever done pursuant thereto.

Alternatively, an area may be certified with a part being redeveloped and the balance remaining untouched. Under these circumstances, it is both practical and logical to await an actual condemnation before challenging a certification. Consider the possible alternative if blight were challenged at the time of Planning Commission consideration. A property owner could challenge the certification, the parties litigate the same, exhaust their appellate remedies, and after years of litigation learn that there is still no redevelopment project which might result in a taking of property.

It is also important here that Pennsylvania law does provide a remedy of which Petitioners or their predecessors in title failed to avail themselves. Justice Zappala, writing for the majority in the Supreme Court of Pennsylvania, stated that the Court had held that an action in equity will lie to challenge a certification of blight. *Crawford v. Redevelopment Authority*, 418 Pa. 549, 211 A.2d 866 (1965) (App. A-12)

Finally, the Petitioners asserted in paragraph 7 of their Preliminary Objections (App. A-75) that the area was not blighted as of the date of condemnation. Petitioners abandoned such point, but despite such abandonment, URA chose to meet the issue squarely and introduced expert testimony which reviewed the blight criteria set forth in the URL and concluded that, based upon such criteria, the area remained blighted at the time of condemnation.

CONCLUSION

The Supreme Court of Pennsylvania concluded correctly that a certification of an area as blighted by a local Planning Commission does not constitute a taking of property, and that if and when a redevelopment project resulting from such certification is approved by the City Counsel, an aggrieved property owner may challenge such approval in equity at such time. Further, since a property owner may also challenge certification if and when the property is condemned, a condemnee has not been deprived of a due process hearing.

Accordingly, Petitioners' Petition for Writ of Certiorari to the Supreme Court of Pennsylvania should be denied.

Respectfully submitted,

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